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1
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v.
United States

Docketed:
May 1, 1987

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Timbie, Richard E.

Counsel for respondent: Solicitor General

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|---|
| 1 | May 1 1987 | G | Petition for writ of certiorari filed. |
| 3 | Jun 1 1987 | - | Order extending time to file response to petition until June 30, 1987. |
| 4 | Jun 30 1987 | | DISTRIBUTED. September 29, 1986 |
| 5 | Jun 30 1987 | | REDISTRIBUTED. September 28, 1987 |
| 6 | Jun 30 1987 | X | Brief of respondent United States in opposition filed. |
| 7 | Oct 5 1987 | | Petition GRANTED. ***** |
| 8 | Oct 20 1987 | G | Motion of petitioner to dispense with printing the joint appendix filed. |
| 9 | Nov 2 1987 | | Motion of petitioner to dispense with printing the joint appendix GRANTED. |
| 11 | Nov 12 1987 | | Order extending time to file brief of petitioner on the merits until November 30, 1987. |
| 12 | Nov 30 1987 | | Brief of petitioner John Doe filed. |
| 13 | Nov 30 1987 | | Brief amicus curiae of Government of Cayman Islands filed. |
| 14 | Dec 8 1987 | | Record filed. |
| | | * | Certified copy of original record and C. A. proceedings, 5 volumes, box, received. |
| 16 | Dec 30 1987 | | Order extending time to file brief of respondent on the merits until January 4, 1988. |
| 17 | Jan 4 1988 | | Brief of respondent United States filed. |
| 18 | Jan 5 1988 | | SET FOR ARGUMENT. Wednesday, March 2, 1988. (1st case). (1 hour). |
| 19 | Jan 14 1988 | | CIRCULATED. |
| 20 | Feb 1 1988 | X | Reply brief of petitioner John Doe filed. |
| 21 | Mar 2 1988 | | ARGUED. |

**PETITION
FOR WRIT OF
CERTIORARI**

86 1753 ①

FILED

MAY 1 1987

JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

IN RE GRAND JURY INVESTIGATION, 84-2,

JOHN DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

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QUESTION PRESENTED

Whether a court order compelling a target of a grand jury investigation to authorize foreign banks to disclose records of his accounts violates the target's Fifth Amendment privilege against self-incrimination.

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IN THE
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IN RE GRAND JURY INVESTIGATION, 84-2,

—
JOHN DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—
**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**
—

The petitioner, John Doe, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 13, 1987.

OPINION BELOW

The unpublished opinion of the Court of Appeals appears in the appendix. (App. 1a).

JURISDICTION

The Court of Appeals entered judgment on February 13, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V:

No person . . . shall be compelled in any criminal case to be a witness against himself

....

STATEMENT OF THE CASE

John Doe is a target of a grand jury investigation inquiring into possible federal offenses involving alleged fraudulent manipulation of oil cargos and receipt of unreported income. On October 5, 1983, the grand jury issued two subpoenas to Doe for all records of foreign bank accounts over which he had signatory authority. Doe complied with the subpoenas by appearing before the grand jury and producing bank records. He confirmed in testimony before the grand jury that no additional records responsive to the subpoenas were in his possession or control. When asked questions concerning the existence and location of bank records not in his possession or control, Doe asserted his Fifth Amendment privilege against self-incrimination. (App. 17a). The grand jury did not seek to compel further compliance with the subpoenas.

Eight months after Doe's appearance, the government sought an order compelling him to sign forms that would authorize two Cayman Islands banks and one Bermuda bank to disclose records of twelve accounts. The government submitted proposed "consent" directives for each account, noting the name of the account and the account number. Doe resisted on the ground that compelling him to execute the directives would violate his Fifth Amendment privilege against self-incrimination.

Meanwhile, the government served grand jury subpoenas on the U.S. branches of the three foreign banks demanding production of the records described in the directives. The banks refused to comply with the subpoenas, citing provisions of the bank secrecy laws of the Cayman Islands and Bermuda. The government has not sought contempt sanctions for the banks' failure to comply.

On December 6, 1984, the district court denied the government's motion to compel Doe to execute the directives. (App. 16a). The court held that requiring Doe to execute the consent directives would violate the Fifth Amendment by compelling him to admit the existence of the records sought by the grand jury and to disclose his signatory authority over the foreign bank accounts. (App. 19a-20a).

The government moved for reconsideration and submitted a revised consent directive, which purports to apply to any and all accounts over which Doe has signatory authority. (App. 12a-13a). The government also submitted an affidavit of an IRS special agent summarizing information known to the grand jury about Doe's foreign bank accounts. The affidavit stated that 1) the grand jury has linked eleven accounts to Doe based on Doe's filings with the Internal Revenue Service or the records Doe produced to the grand jury, and 2) the grand jury has evidence of a twelfth account, in the name of the XYZ Co., which it suspects Doe controls.

The district court denied the government's motion for reconsideration. (App. 10a). It recognized that the grand jury has information connecting Doe to some foreign bank accounts, but it found that the revised consent directive would compel Doe to acknowledge

his connection to accounts unknown to the grand jury. (App. 12a). The court also found as a fact that, in the absence of Doe's consent, the grand jury lacks evidence that Doe controls the XYZ Co. account. (App. 11a). The court ruled that Doe would provide the government with potentially incriminating testimony by signing the directive.

The government appealed, and the United States Court of Appeals for the Fifth Circuit reversed the district court in an unpublished *per curiam* opinion relying on its decision in *In re United States Grand Jury Proceedings (Cid)*, 767 F.2d 1131 (5th Cir. 1985) (App. 5a). Doe filed a petition for certiorari, which respondent opposed solely on the ground that the decision of the Fifth Circuit was interlocutory. This Court denied certiorari. 106 S.Ct. 1197 (1986).

On May 2, 1986, the district court ordered Doe to execute the consent directive. Doe appeared on August 11, 1986, but declined to comply with the court's order. The district court entered an oral finding of contempt and ordered Doe confined pursuant to 18 U.S.C. § 1826. The court then granted Doe's motion for a stay of sanctions pending appellate review. The Fifth Circuit affirmed the finding of contempt. (App. 1a).

REASON FOR GRANTING THE WRIT

The Decision Below Conflicts With A Decision Of Another Circuit And Raises An Important Constitutional Question

The Fifth Circuit's decision that the compelled "consent" procedure is consistent with the Fifth Amendment privilege against self-incrimination conflicts with a recent decision of another circuit. In *In*

re Grand Jury Proceedings (Ranauro), ___ F.2d ___, No. 86-1832, slip op. (1st Cir. March 23, 1987) (*per curiam*), the First Circuit held that requiring a target of a grand jury investigation to authorize the release of foreign bank records violated his Fifth Amendment privilege. The First Circuit acknowledged that its holding is in conflict with decisions of the Fifth and the Eleventh Circuits. *See id.*, slip op. at 10 (citing *In re United States Grand Jury Proceedings (Cid)*, 767 F.2d 1131 (5th Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984), *cert. denied*, 469 U.S. 932 (1985)).¹

The decision below ignores the policies and values at the core of the Fifth Amendment privilege against self-incrimination. The privilege reflects a system of criminal justice that "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966), citing *Chambers v. Florida*, 309 U.S. 227, 235-238 (1940). It requires "the government in its contest with the individual to shoulder the entire load" and embodies "our respect for the inviolability of the human personality." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the

¹ Compare also *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985) (finding no Fifth Amendment violation in the compelled consent procedure) with *Senate Select Committee on Secret Military Assistance To Iran And The Nicaraguan Opposition v. Secord*, No. 87-0090, slip op. (D.D.C. April 16, 1987) and *United States v. Pedro*, No. C 86-0968-L(A), slip op. (W.D.Ky. April 6, 1987) (holding the compelled consent procedure unconstitutional).

respect a government . . . must accord to the dignity and integrity of its citizens." *Miranda*, 384 U.S. at 460.

Recognizing that the privilege must be "as broad as the mischief against which it is to guard," *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), this Court has held that the Fifth Amendment bars the government from compelling an individual to make any testimonial communication that might tend to incriminate him. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920). The protection afforded by the privilege extends to any form of compelled conduct that entails incriminating communication. *United States v. Doe*, 465 U.S. 605, 612-14 (1984); *Fisher v. United States*, 425 U.S. 391, 410 (1976); see *Schmerber v. California*, 384 U.S. 757, 764 (1966). In the line of cases holding that the privilege does not apply to the compelled production of non-testimonial physical evidence, the Court squarely based its holding on a finding that the conduct being compelled entailed no communication. See, e.g., *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (handwriting exemplar); *United States v. Wade*, 388 U.S. 218, 222-23 (1967) (lineup and voice exemplar); *Schmerber*, 384 U.S. at 764-65 (1966) (blood test). For, as the Court recognized, the Fifth Amendment proscribes any "compulsion of 'an accused's communications, whatever form they may take.'" *Gilbert*, 388 U.S. at 266 (quoting *Schmerber*, 384 U.S. at 763-64).

The opinion below ignores these precedents in authorizing the government to compel a testimonial communication. The government is not seeking an exemplar of Doe's physical signature. It wants him

to affirm and adopt the statement contained in the consent directive. Compelling him to sign the directive for that purpose would be no less testimonial than compelling him to state orally that he authorizes release of the records. In either event, the government would compel him to make a statement so it can use the content of the statement to further its criminal investigation.

Nor can there be any serious doubt that the statement in the consent directive might tend to incriminate Doe. This Court has adopted a broad test for determining whether a compelled communication is incriminating:

The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the [accused] for a federal crime.

Hoffman, 341 U.S. at 486 (emphasis added). Under this standard, communications that might furnish "investigatory leads" are protected by the privilege. *Kastigar v. United States*, 406 U.S. 441, 445 (1972); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 80 (1965).

The government is seeking to compel Doe to authorize the foreign banks to turn over records that it would use to prosecute him. Indeed, gaining access to incriminating evidence is the avowed purpose of the compelled "consent" procedure. The consent directive is intended to be nothing but "a link in the chain of evidence needed to prosecute" a defendant.

The particular consent directive at issue in this case may also be incriminating in the narrower sense that it might constitute evidence the government could use against Doe. For example, if, as the government suspects, Doe has the right to withdraw funds from the XYZ Co. account, the bank will produce records of that account upon receipt of Doe's authorization. Once the records are produced, Doe's statement in the consent directive will become admissible evidence that he controls the account. *See In re Grand Jury Proceedings (Ranauro)*, slip op. at 4-5.

Further potential for incrimination derives from the broad language of the directive. Because it encompasses any accounts over which Doe has signatory authority, the directive may trigger the release of records revealing accounts presently unknown to the grand jury. In that event, Doe's authorization will amount to a compelled admission that he controls those accounts.

Plainly, the district court order in this case compels testimonial self-incrimination. Ordering Doe to execute the directive violates the Fifth Amendment's guarantee that an individual under criminal investigation may "remain silent unless he chooses to speak in the unfettered exercise of his own will." *Mallory v. Hogan*, 378 U.S. 1, 8 (1964). In sustaining the district court's order in the face of petitioner's invocation of the privilege against self-incrimination, the Fifth Circuit is in direct conflict with the First Circuit on a recurring issue of vital concern. This Court should grant certiorari to resolve this conflict and to hold that the compelled consent procedure is an affront to the Fifth Amendment.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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May, 1987

APPENDIX

APPENDIX A
IN THE
UNITED STATES COURT OF
APPEALS

FOR THE FIFTH CIRCUIT

No. 86-2663
Summary Calendar

IN THE MATTER OF GRAND JURY 84-2.,
JOHN DOE,

Appellant.

Appeal from the United States District Court for
the Southern District of Texas
(Misc. No. H-84-242)

(February 13, 1987)

Before GEE, REAVLEY and JOLLY, Circuit Judges.

PER CURIAM:*

John Doe appeals from an order of the district court holding him in contempt for refusing to comply with

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

an order of the court requiring him to execute consent forms allowing the disclosure to a grand jury of bank records held by him in foreign countries. Because a prior decision made by this court in this case is dispositive of Doe's appeal, the district court's order is affirmed. The government in turn requests this court to vacate the stay of imposition of contempt sanctions on Doe issued by the district court. Since the government has not filed a timely cross-appeal from the district court's order, its request is denied.

I

On October 8, 1985, this court, in an unpublished opinion, reversed and held that Doe could not assert his fifth amendment privilege as a basis for refusing to sign the consent form. *See* 775 F.2d 300 (5th Cir. 1985). Doe then filed a petition for a writ of certiorari with the Supreme Court. In its response to his petition, the government argued that this court's order was interlocutory and its holding could be reviewed by the Supreme Court only on appeal of a judgment of contempt against Doe. Certiorari was denied. 106 S.Ct. 1197 (1986).

By order of May 2, 1986, the district court ordered Doe to appear and execute the consent. Doe appeared before the court on August 11, but again refused to sign the consent. The court found Doe in contempt and ordered that he be confined pursuant to 18 U.S.C. § 1826. Doe moved for a stay of sanctions pending appeal and an application for a writ of certiorari, arguing that the contempt finding was necessary to produce an appealable order; the order would be the basis of a petition for certiorari that the Supreme Court would consider on the merits of the constitu-

tional issue. The district court granted Doe's motion and stayed imposition of sanction pending appeal and application for a writ of certiorari.

II

The sole basis advanced by Doe for reversing the district court's contempt order is that this court's prior decision, which found that release of Doe's bank records held in foreign countries would not violate his fifth amendment rights, was in error. Under the doctrine of the law of the case, however, Doe's position must be rejected.

Under the "law of the case" doctrine, once the court decides an issue, that decision will remain binding on the court in all subsequent proceedings in the same case in trial court or on a later appeal in the appellate court, unless (1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work manifest injustice. *Adams-Lundy v. A.P.F.A.*, 792 F.2d 1368, 1371-72 (5th Cir. 1986); *Morrow v. Dillard*, 580 F.2d 1284, 1289-91 (5th Cir. 1978). Doe does not argue that any of these exceptions is present in this case. Consequently, this court cannot reconsider its prior ruling. The district court's contempt order is therefore affirmed.

II

In its brief, the government requests this court to vacate the stay of the imposition of contempt sanctions entered by the district court. But the government has failed to file a cross-appeal. It is well

established that without the filing of a cross-appeal, an appellee may not attack the district court judgment, whether seeking to correct it or to supplement it. *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924); *Ayers v. United States*, 750 F.2d 449, 457 (5th Cir. 1985); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 678 (5th Cir. 1983).

IV

For the reasons discussed earlier, the contempt order of the district court is

AFFIRMED.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-2373
Summary Calendar

IN RE GRAND JURY INVESTIGATION, 84-2
UNITED STATES OF AMERICA,

Appellant,

versus

JOHN DOE,

Appellee.

Appeal From The United States District Court
For The Southern District of Texas
Before: REAVLEY, TATE and HILL, Circuit Judges.
PER CURIAM:*

The district court denied a motion, brought by the U.S. Attorney as part of a grand jury investigation, to compel defendant John Doe to sign a consent to the production of bank records. The government has

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

appealed this denial, and Doe has appealed the district court's determination that it had jurisdiction to consider the motion. We agree that the district court had jurisdiction, but we reverse the denial of the motion to compel.

The threshold issue on appeal is Doe's claim that the district court lacked jurisdiction to consider the government's motion to compel. Doe relies principally on *In re Melvin*, 546 F.2d 1, 4-5 (1st Cir. 1976), and *United States v. O'Kane*, 439 F.Supp. 211, 215 (S.D. Fla. 1971), which both held that it was improper for a district court to consider a motion to compel made as part of a grand jury investigation when the U.S. Attorney made the motion on his own initiative without formal action by the grand jury. The circumstances present in *Melvin* and *O'Kane*, however, are different from those in this case. The motions in *Melvin* and *O'Kane* had no connection to any specific directive issued by a grand jury. Here, the opposite is true. The government's motion was made to aid the enforcement of a grand jury directive: subpoenas served on the banks.

While a district court unquestionably has jurisdiction over any direct action taken to enforce subpoenas issued by grand juries, it also has the power to issue orders which would aid its enforcement of such subpoenas. All Writs Act, 28 U.S.C. § 1651(a) (1966). That power "extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of the court order or the proper administration of justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 174, 98 S.Ct. 364, 373, 54 L.Ed.2d 376, ____ (1977). Since the

banks will not readily release any records relating to Doe without his consent, he is in a position to frustrate the grand jury's investigation. Compelling him to sign the consent would facilitate the enforcement of the subpoenas served on the banks. Under these circumstances, it was appropriate for the district court to consider the motion to compel.

The second issue on appeal is whether the district court properly denied the government's motion to compel. The district court found that compelling Doe to sign the consent form would violate his Fifth Amendment rights because the consent would have testimonial significance. In *United States v. Juan Antonio Cid-Molina*, No. 85-4271, slip op. at 6170 (5th Cir. July 30, 1985), however, we recently found that signing a virtually identical consent form did not have testimonial significance for the same reasons. We hold, therefore, that the district court erred by refusing to grant the government's motion and reverse.

REVERSED and REMANDED.

APPENDIX C
IN THE
UNITED STATES COURT OF
APPEALS

FOR THE FIFTH CIRCUIT

—
 No. 85-2373
 —

IN RE: GRAND JURY INVESTIGATION, 84-2
 UNITED STATES OF AMERICA,

Appellant,

versus

JOHN DOE,

Appellee.

—
 Appeal from The United States District Court
 For The Southern District of Texas
 —

FILED
 November 12, 1985

 UNITED STATES
 DISTRICT COURT
 DISTRICT OF TEXAS
 —

ON PETITION FOR REHEARING
 (November 12, 1985)

Before REAVLEY, TATE and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing
 filed in the above entitled and numbered cause be
 and the same is hereby denied.

ENTERED FOR THE COURT:

APPENDIX D
IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF TEXAS
 HOUSTON DIVISION

IN RE: GRAND JURY INVESTIGATION

FILED
 April 17, 1985

CLERK U.S. DISTRICT COURT
 SOUTHERN DISTRICT OF TEXAS
 By _____ Deputy

ORDER

Pending before the Court is the Government's Motion to Reconsider this Court's prior Order. In that Order, this Court denied the government's motion to compel the respondent to execute consent forms which would allow three foreign banks to supply the government with bank records, thereby circumventing the foreign government's secrecy laws.

In the present motion, the government has attached a revised proposed consent form which the government indicates was approved in *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984), cert. denied, — U.S. —, 105 S.Ct. 328, 83 L.Ed.2d 264 (1984).¹ Ad-

¹Although this Court indicated that [had respondent] "been compelled to sign the consent forms propounded by the government, several tex-

ditionally, the government presents in its motion to reconsider an affidavit of the Internal Revenue agent which outlines various transactions occurring within and between foreign bank accounts located in the three banks referred to in the government's motion to compel. Apparently, most of these accounts were identified by Doe in a statement to the United States Treasury, or in response to the subpoena *duces tecum* issued by the grand jury. However, the government admits that as to at least one of the known accounts of which it [the government] seeks bank records,² there exists only speculation as to Doe's involvement with the account.

This Court recognizes that respondent, through his own admissions, vitiated any fifth amendment argument as to the foreign accounts that were revealed to contain his name. In essence, has made the existence, possession or control, and authentication of certain foreign accounts a "foregone conclusion." See *United States v. Doe*, — U.S. —, 104 S.Ct. 1237, 1241 (1984); *Fisher v. United States*, 425 U.S. 391, 411 (1976); see also *United States v. Brown*, 688 F.2d 1112, 1116 [documents which were voluntarily produced and implicitly represented as the records sought cannot be regarded as not authenticated]. While this

tual changes would have been required," this Court had no intention of indicating that if a proposed consent form was presented that complied with *Ghidoni*, this Court's opinion would have differed. In *Re Grand Jury Investigation John Doe*, — F. Supp. —, n.3 (S.D. Tex. 1984) (Misc. No. H-84-242). Rather, the textual changes referred to in the prior Order were in reference to all the facts and circumstances surrounding this case, including the recent Cayman Island decision cited in the opinion.

²Account number—in the name of [XYZ Co.], located in the Bank of Nova Scotia.

Court, as well as the government, is apprised of respondent's connection with certain foreign accounts, this Court is reluctant to follow the holding in *Ghidoni*,³ and require respondent to execute the consent form. Although respondent has conceded the existence, possession or control, and authentication of certain accounts, the government has equally acknowledged that certain accounts exist which do not indicate any connection with Doe. Therefore, assuming the foreign banks comply with the consent directive,⁴ and assuming respondent is compelled to execute the consent form,⁵ not only may the government ob-

³In contrast to *Ghidoni*, this case involves admissions by the respondent, whereas, in *Ghidoni* the defendant denied existence of any accounts.

⁴As noted in this Court's prior Order, the Cayman Island Court issued an opinion in response to *Ghidoni* which indicated that the consent to disclose was not a "consent" within the meaning of their laws. As a result, the Cayman Island Court refused to acknowledge the consent to disclose executed by the defendant in *Ghidoni*.

⁵The "new" proposed consent form reads as follows:

DIRECTION

I, _____, of the State of Texas in the United States of America, do hereby direct any bank or trust company at which I may have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to said bank account to Grand Jury 84-2, empaneled May 7, 1984 and sitting in the Southern District of Texas, or to any attorney of the District of Texas, or to any attorney of the United States Department of Justice assisting said Grand Jury, and to give evidence relevant thereto, in the investigation conducted by Grand Jury 84-2 in the Southern District of Texas, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Southern District of Texas issued in

tain a necessary link to connect Doe with the "speculative" accounts,⁶ but it may also acquire documentation of accounts which it has no present knowledge exist. As stated in this Court's prior Order, "any records delivered pursuant to the form[s] would be records of respondent's accounts or accounts he controlled, and would be an admission that respondent exercised signatory authority over such accounts."⁷ *In Re Grand Jury Investigation John Doe*,

connection with the aforesaid investigation, dated _____. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and to any implied contract of confidentiality between Bermuda banks and their customers which may be imposed by Bermuda common law, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

⁶Essentially this Court has identified three separate "sets" of accounts: (a) accounts admittedly connected with respondent; (b) accounts which the government is unable to connect with respondent ("speculative" accounts); and (c) accounts currently unknown to the government, but which may exist.

⁷Moreover, not only would execution of the consent admit signatory authority over the speculative accounts, but it would implicitly authenticate any records of the speculative accounts provided by the banks pursuant to the consent. While the government argues that since the records belong to the banks and, therefore, the respondent would not have to authenticate the records, the Court recognizes the inherent problems the government may have in summoning a foreign bank official to testify, or obtaining certification of an official of the foreign banks that the records are genuine because of the bank secrecy laws. Moreover, conceivably the government could authenticate the records by introducing the signed consent, and by providing testimony of the government agent who received the records pursuant to the consent. However, "authentication cannot be incriminating unless the contents of the document tend to incriminate." *Butcher v. Bailey*, 753 F.2d 465, 470 (6th Cir. 1985). The test to be applied, however, is whether production itself might constitute "a link in the chain of evidence needed to prosecute" the respondent. *Hoffman v. United States*, 341 U.S. 479, 486.

— F. Supp. —, (S.D. Tex. 1984) (Misc. No. H-84-242) (emphasis added).

In essence, although this Court's reasoning in the prior Order would not apply to the accounts which Doe admitted existed and which he controlled, this Court's statement would apply both to accounts not presently known to exist, and to the "speculative" accounts. Therefore, this Court again concludes that execution of the consent form would be a compelled testimonial communication.

Moreover, the fact remains that respondent has not been indicted.⁶ While the government has respondent's admissions of some of the foreign accounts, the government only has a belief that is tied to other foreign accounts. This indicates that the government currently does not have enough information to obtain an indictment. Thus, by compelling respondent to execute the proposed consent form, he could be supplying the government with the incriminating information necessary to connect himself with alleged illegal activity, thereby subjecting himself to possible prosecution.

Accordingly, after careful consideration of the relevant law, the facts and circumstances, and the memoranda of the parties, together with the information supplied this Court by the government, this Court is of the opinion that the government's motion should be denied.

It is so ORDERED.

⁶Contra, *Ghidoni*, 732 F.2d 814.

SIGNED AND ENTERED at Houston, Texas, on
this the 27th day of April, 1985.

Carl O. Bue, Jr.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF TEXAS HOUSTON DIVISION

IN RE: GRAND JURY INVESTIGATION

FILED

December 6, 1984

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
By _____ Deputy

ORDER

Pending before the Court is the Government's Motion to Compel Doe to Consent to Disclosure of Records by the Barclays Bank International, the Bank of Nova Scotia, and the Bank of Bermuda. Specifically, the government wants this Court to enter an order commanding respondent to execute consent forms which would allow the foreign banks to supply the government with bank records, and consequently circumvent the foreign government's secrecy laws.

After careful consideration of the relevant law, the memoranda and supplemental materials of the parties, and the facts and circumstances, this Court is of the opinion that the government's motion should be denied for the reasons discussed below.¹

¹Although this Court will not compel execution of the consent forms,

On November 16, 1983, respondent was commanded to appear before the grand jury and produce records of foreign bank accounts. Specifically included in the subpoenas were records from the three foreign banks which the government now seeks this Court's assistance in obtaining through a compelled consent from respondent. Respondent produced some of the records described in the subpoenas, and testified that no further documents were in his possession or control. When questioned about the possible existence or location of additional documents, respondent invoked his fifth amendment privilege. As a result, the government filed this motion.

Respondent first asserts that this Court lacks jurisdiction to compel him to execute the consents because no controversy exists between the grand jury and respondent. In other words, respondent has complied with the subpoenas by turning over all records in his possession or control. However, this Court determines that jurisdiction exists since respondent failed to provide all documents commanded in the subpoena *duces tecum*, and instead invoked his fifth amendment privilege as to those documents he failed to produce.²

other courts have ordered compelled execution of consents to disclosure in order to circumvent the foreign bank secrecy laws. See *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984).

²Additionally, a controversy exists between the foreign banks and the grand jury. The United States branches of the foreign banks refused to comply with recently served subpoena *duces tecum* which commanded the production of respondent's foreign bank records, claiming that production of any records would violate the foreign government's bank secrecy laws. Therefore, the consent also would be required in this controversy.

Respondent next asserts³ that signing the consent would violate his fifth amendment privilege in that it would compel him to perform a testimonial act within the meaning of *United States v. Doe*, ___ U.S. ___, 104 S.Ct. 1237 (1984). The government argues that the consents are analogous to a compelled handwriting exemplar, which was approved by the Supreme Court in *Gilbert v. California*, 388 U.S. 267 (1967). Moreover, the government asserts that an order compelling respondent to sign the consent forms would merely remove an obstacle to the production of bank records placed there by the respondent.

Before asserting the fifth amendment privilege in response to a subpoena *duces tecum*, three elements must be present. These elements are (1) compulsion, (2) testimonial communication, and (3) incrimination by such communication. *United States v. Authement*, 607 F.2d 1129, 1131 (5th Cir. 1979) (per curiam). The issue before the Court, therefore, is whether signing the proposed consent forms would be a testimonial communication which may incriminate respondent.

³Moreover, respondent contends that his fifth amendment privilege would be violated in that he would be required to testify by affirming the statement in the proposed consent forms that he consented to disclosure of certain records. In other words, the consent would be a sworn misstatement since respondent did not consent to disclosure. This argument is without merit. See *United States v. Ghidoni*, 732 F.2d at 818, n. 7 (11th Cir. 1984). However, this Court realizes that, had Doe been compelled to sign the consent forms propounded by the government, several textual changes would have been required.

Moreover, as a side issue, in light of the recent Cayman Islands court decision, Judgment of July 24, 1984, Grand Court of the Cayman Islands Holden at Georgetown, Grand Cayman, had this Court required respondent to execute the consent forms, there is a strong indication that the Cayman banks would not comply. (See Exhibit "A" for copy of the foreign opinion).

Whether a testimonial communication exists must be determined by the facts of each case. *United States v. Fisher*, 425 U.S. 391, 410-411 (1976). Moreover, if the act of producing supplies a necessary link in the government's evidentiary chain, the burden of establishing that the act is a compelled testimonial communication may be satisfied. In other words, "does it confirm that which was previously unknown to the government?" *United States v. Schlansky*, 709 F.2d 1079, 1084 (6th Cir. 1983). The test utilized in *United States v. Fox*, 721 F.2d 32, 38 (2nd Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1591 (1984), was whether the compulsion of production would add to the "sum total of the Government's information."

Although the government has provided this Court with some evidence of foreign bank accounts, this Court concludes that by compelling respondent to sign the all-encompassing proposed consent forms,⁴ exist-

⁴One of the proposed consent forms is reproduced below:

I, John Doe consent to production of the following records by the Barclays Bank International, Ltd. to the United States District Court for the Southern District of Texas:

The following documents or records for each savings, checking, or other financial account (including trust accounts) maintained by Barclays Bank International, Ltd., at any of its main or branch offices in the Cayman Islands for John Doe since January 1, 1979:

1. Signature cards
2. Powers of attorney
3. Trust agreements and related documents
4. Complete ledger statements for each account from January 1, 1979 through the present
5. All checks drawn on each account from January 1, 1979 through the present in amounts exceeding \$1,000 (U.S. or Cayman Islands)
6. All deposit tickets plus the items deposited with each

ence of the accounts would necessarily be admitted.⁵ Moreover, any records delivered pursuant to the forms would be records of respondent's accounts or accounts he controlled, and would be an admission that respondent exercised signatory authority over such accounts.⁶ In other words, the compelled consent may enable the government to obtain records which may add to its [the government's] information.

Moreover, Doe has not been indicted. While the government appears to have some evidence which has been tendered for this Court's review, the government apparently does not have enough evidence to obtain an indictment. The government admits that the grand jury is currently investigating respondent and others for various statutory violations. However, this Court maintains that by compelling respondent to ex-

deposit ticket from January 1, 1979 through the present in amounts exceeding \$1,000 (U.S. or Cayman Islands)

7. Cashier's checks or other bank checks in amounts exceeding \$1,000 (U.S. or Cayman Islands) purchased with money from any of those accounts from January 1, 1979 through the present
8. Debit items for those accounts in amounts exceeding \$1,000 (U.S. or Cayman Islands) from January 1, 1979 through the present.

⁵*Contra United States v. Ghidoni*, 732 F.2d at 817, n.4. This Court has determined that the proposed forms in this case contain incriminating testimony in the contents.

⁶In a subsequent proceeding, the government could argue that since respondent exercised authority over the accounts listed, he must have guilty knowledge of the contents. A witness cannot be compelled to perform a testimonial act that would entail admission of knowledge of the contents of potentially incriminating documents. *In re Grand Jury Subpoenas Duces Tecum*, dated June 13, 1983, and June 22, 1983, 722 F.2d 981, 987 (2nd Cir. 1983)

ecute the proposed consent forms, Doe may be providing the government with the incriminating link necessary to obtain an indictment. This is "precisely [the] sort of fishing expedition that the fifth amendment was designed to prevent." *United States v. Fox*, 721 F.2d at 38.⁷

Accordingly, the government's motion is denied.

It is so ORDERED.

SIGNED AND ENTERED at Houston, Texas, on this the 6th day of December, 1984.

Carl O. Bue, Jr.
United States District Judge

EXHIBIT "A"

In The Grand Court of the Cayman Islands
Holden At George Town, Grand Cayman
Cause No. 269 of 1984

Before: THE HON. SIR JOHN SUMMERFIELD CBE.,
Q.C., J.P., Chief Justice

In The Matter Of The Confidential Relationships
(Preservation) Law, Law
16 of 1976

- AND -

In The Matter Of The Con-

⁷If, however, the government requires the foreign bank records, case law has afforded another possible remedy. See *In re Grand Jury Proceedings, The Bank of Nova Scotia*, 722 F.2d 657 (11th Cir. 1983), after remand, 740 F.2d 817 (11th Cir. 1984).

Confidential Relationships
(Preservation) Amendment
Law 1979 Law 26 of 1976

- AND -

In The Matter Of Consent
Directives Executed Pursuant
To Orders Of Foreign Courts

- AND -

In The Matter Of An Application
By ABC LTD. Under The Confidential
Relationships (Preservation)
(Amendment) Law 1979.

JUDGMENT

This Summons was heard in Chambers but in view of the importance of the issue raised, it is ordered that the judgment be delivered in open court with all references to any party or to any confidential information omitted. To that end, the name of the applicant in the title is referred to as ABC LTD., instead of by its proper name. The Cause Book will be amended accordingly. All information in the Court file or otherwise relating to the proceedings remains confidential and protected and may not be divulged except by order of this Court.

The Summons seeks an order in one or more of the following terms:

1. A Direction as to whether or not the applicant can disclose confidential information to a foreign Gov-

ernmental agency pursuant to a consent signed in compliance with an order and/or Direction of a foreign Court or Tribunal.

2. A declaration that "a Consent Directive" signed by anyone pursuant to an order or directive of a foreign Court or Tribunal which can impose penal sanctions for disobedience of the compelling order or directive is not a consent sufficient to negative the application of the Confidential Relationships (Preservation) Law as amended.

3. Alternatively a declaration that "a Consent Directive" signed by anyone pursuant to an order or directive of a foreign Court or Tribunal which can impose penal sanctions for disobedience of the compelling order or directive is "a consent" sufficient to make the provisions of the Confidential Relationships (Preservation) Law as amended inapplicable.

4. A declaration as to the meaning of the word "consent" in Section 3 (2)(b) (i) of the Confidential Relationships (Preservation) Law as amended.

5.

The application is made in consequence of a majority decision of the United States Court of Appeals 11th Circuit No. 84-3101, United States of America, Plaintiff—appellant, decided on 2nd May, 1984 and reported in U.S. Tax Cases. In that case the unsuccessful appellant was held to be in contempt of court for refusing to comply with an order of the district court compelling him to sign a "consent directive" in the following terms:

I, LAWRENCE L. GHIDONI of the State of Florida in the United States of America do hereby direct any bank or trust company at which I have a bank account of any kind or at which a corporation has a

bank account of any kind upon which I am authorized to draw specifically including The Bank of Nova Scotia and The Bank of Nova Scotia Trust Company (Cayman) Limited and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the United States Department of Justice, and to give evidence relevant thereto in the case of the United States of America v. Lawrence L. Ghidoni, Case No. TCR 83-07016, now pending in the United States District Court for the Northern District of Florida, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Northern District of Florida in the aforesaid case, dated December 30, 1983. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

The applicant, engaged in the business of banking and the management of Companies and trusts and, in that capacity, in possession and control of confidential information relating to the affairs and business of many clients, apprehends that the precedent set in Ghidoni's case may lead to an extensive use of the same process and wishes to clarify its position in relation to its own clients if one or more is or are compelled by a foreign court to sign such a consent directive. The indications are that the same process has been invoked in other courts in the United States of America.

One can begin by emphasizing the obvious, to avoid any misunderstanding, and that is that what follows relates solely to the position in this jurisdiction.

Several observations may usefully be made at this stage.

The applicant's obligation and duty is to its client. The applicant might just as well be liable in damages to its client for not giving effect to a client's lawful instructions as for wrongly giving effect to them or for any other misfeasance.

So far as the terms of the consent directive under examination are concerned, the applicants would be under no obligation to the United States Department of Justice or any attorney thereof. Such a consent directive would give rise to no legal or other relationship so as to create any such obligation on the part of applicant. Neither would such a consent directive give rise to any rights in the United States Department of Justice or any attorney thereof as against the applicant. No enforceable right would be created in favour of the United States Department of Justice or any attorney thereof. The client would retain authority over the disposition of the confidential information relating to him.

The purported irrevocability of the consent directive is inoperative. The client could always revoke the instruction in it before effect had been given to them. Revocation might have dire consequences vis a vis the foreign court but this court is only concerned with the position in this jurisdiction of such a consent directive compelled by a foreign court.

The consent directive purports to have effect in relation to a bank account of a corporation upon which

the person signing the consent directive is authorized to draw. The principal in relation to such an account is the corporation itself acting through its directors or officers empowered to give authority for disclosure. This is not necessarily an officer or employee authorized to draw on the account. A comparatively junior employee could have power to draw on the account on behalf of the corporation. Only the principal can give consent.

One can turn now to the main point and that is whether consent given pursuant to an order by a foreign court under pain of criminal penalties amounts to consent for the purpose of section 3(2)(b)(i) of the Confidential Relationship (Preservation) Law 1976 as amended. It must be stressed that the only alternative to signing the consent directive ordered by the court is punishment by way of fine or imprisonment. It is signed under compulsion backed by criminal sanctions.

I am of the view that such a consent directive does not amount to consent as contemplated by section 3(2)(b)(i) and that it is ineffective for the purposes of that provisions.

In saying this I am not unmindful of the fact that this court has itself ordered directions in substantially similar terms for the purpose of enforcing an order for premature discovery and the preservation of property. Those directions were aimed at banks within the jurisdiction. It was appreciated at the time that those orders were novel and without precedent. They were not challenged—largely because they were ineffective for reasons which need not be gone into. Unfortunately the point taken in this matter was not argued when the orders were made. Had they been challenged on the grounds raised in these proceedings the

challenge may have succeeded. On reflection it may well be that it would have been better, and would have achieved the same end, had the provisions of O38 R13 of the Rules of the Supreme Court 1965 been invoked followed by an application under section 3A of the Confidential Relationship (Preservation) Law. At all events this Court was purportedly exercising its powers under the Law of England and Wales as applied by section 20 of the Grand Court Law in relation to entities within its jurisdiction. The position may have to be reviewed in the event of a similar application coming before the court.

As it is I am satisfied that in our law, where consent is a material element giving rise to a legal consequence, it must be voluntarily and freely given in the exercise of an independent and uncoerced judgment. This is a well established principle in every sphere of our law, civil and criminal, and there is no reason to give any different meaning to the expression "consent" in section 3(2)(b)(i).

To take any other view would result in allowing a foreign court to undermine and circumvent the provisions of the Confidential Relationships (Preservation) Law. This is not only important to this country where that Law exists but would be equally important in many other common law countries which respect the principle in *Tournier v. National Provincial and Union Bank of England*, 1923 ALL E.R. Rep. 550, governing the duty of a bank to maintain secrecy—see Paget's Law of Banking 8th Edition p. 166 et seq.

Although in form the consent directive purports to be a consent and direction given by the client of the bank it is in substance a direction given by the foreign

court. It is not real consent at all. In reality it is the foreign court directing the bank to disclose confidential information. In my view the Confidential Relationships (Preservation) Law does not contemplate that situation. In effect the foreign court is usurping the power to order disclosure and, in doing so, completely bypassing the section 3A procedure under that Law.

Apart from anything else, under section 3A this court can edit material that it considers should be released in the interests of justice. The editing process is an important feature in protecting confidentiality in relation to the affairs of a person in respect of whom no case for the release of confidential information has been made out.

In short, consent given under compulsion is merely submission to force and is not consent for the purposes of section 3(2)(b)(i).

On the face of it, the consent given in Ghidoni's case is consent given under compulsion and does not amount to consent for the purposes of our law.

Accordingly, there will be a declaration in terms of paragraph 2 of the summons.

The declaration in relation to paragraph 1 is in the negative.

It follows that a declaration in relation to paragraph 3 does not arise.

The declaration in relation to paragraph 4 is implicit in those in relation to paragraphs 1 and 2.

SIR JOHN SUMMERFIELD

24th July, 1984.

OPPOSITION BRIEF

(2)
No. 86-1753

Supreme Court, U.S.

FILED

JUN 20 1987

JOSEPH P. SPANIOLO, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1753

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that a court order requiring him to consent to the disclosure of certain foreign bank records violates the Fifth Amendment.

1. Petitioner is the subject of an investigation being conducted by a grand jury sitting in the Southern District of Texas. On November 16, 1983, petitioner appeared before the grand jury pursuant to a subpoena that directed him to produce records of transactions in accounts at three banks in the Cayman Islands and Bermuda, countries whose laws prohibit the disclosure of bank records without the bank customer's consent. Petitioner produced some of the requested records and testified that he neither possessed nor controlled the other documents sought by the grand jury. When questioned about the existence or location of additional records, however, petitioner asserted his Fifth Amendment privilege against compulsory self-incrimination. Pet. App. 17a.

On July 2, 1984, the government moved the district court to order petitioner to consent to the disclosure of records relating to accounts that he held or controlled at the three foreign banks. The court denied the motion (Pet.

App. 16a-28a). The court reasoned that petitioner's consent to disclosure would amount to an admission both that the bank records existed and that petitioner "exercised signatory authority over such accounts" (*id.* at 19a-20a (footnote omitted)). The court therefore held that compelling petitioner's consent to release of the records would violate the Fifth Amendment (*id.* at 20a).

The government then sought reconsideration, submitting a proposed consent form for petitioner to sign that was substantially identical to the form approved in *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), cert. denied, 469 U.S. 932 (1984). By signing this form, petitioner would " 'direct any bank or trust company at which [he] may have a bank account of any kind * * * to disclose all information and deliver copies of all documents of every nature in [the bank's] possession or control which relate to said bank account to Grand Jury 84-2.' " The form also made clear that " '[t]his direction has been executed pursuant to * * * order of the United States District Court for the Southern District of Texas.' " Pet. App. 12a n.5. Declining to follow *Ghidoni*, the district court again denied the government's motion. The court stated that compelled "execution of the consent form would be a compelled testimonial communication" (*id.* at 14a).

Relying on its intervening decision in *In re United States Grand Jury Proceedings (Cid)*, 767 F.2d 1131 (5th Cir. 1985), the court of appeals reversed (Pet. App. 5a-7a). The court of appeals explained that the execution of a consent form such as the one at issue in this case does "not have testimonial significance" (*id.* at 7a), so that an order compelling execution of the form does not implicate the Fifth Amendment. The government opposed petitioner's subsequent petition for certiorari on the ground that the court of appeals' decision was interlocutory, and this Court denied the petition (No. 85-1059 (Feb. 24, 1986)).

On remand, the district court ordered petitioner to appear before the grand jury and to execute the consent. Petitioner refused. The court accordingly held petitioner in contempt and ordered him confined until he consented to disclosure of the bank records. Pet. App. 2a. The district court stayed imposition of the sanction, however, to give petitioner an opportunity to appeal (*id.* at 2a-3a). The court of appeals subsequently rejected petitioner's Fifth Amendment argument, holding that its prior ruling on the point was the law of the case (*id.* at 3a). The court of appeals therefore affirmed the district court's contempt order (*id.* at 4a).

2. The decision below is plainly correct. Indeed, three circuits have now held that the Fifth Amendment is not implicated by a court order compelling consent to the disclosure of foreign bank records. These courts have recognized that, "[a]lthough the existence of the bank accounts may be in dispute, nothing in the [compelled consent] directive implies that such accounts exist. Rather, the directive states that *if* the accounts exist, the bank is permitted to disclose records of those accounts." *Ghidoni*, 732 F.2d at 818 (emphasis in original). Accord *United States v. Davis*, 767 F.2d 1025, 1039-1040 (2d Cir. 1985);¹ *In re United States Grand Jury Proceedings (Cid)*, *supra*.

We nevertheless believe that review of the decision below is warranted because that decision—and the rule in the Second, Fifth, and Eleventh Circuits—squarely conflicts with the recent holding of a divided panel of the First

¹ In *In re N.D.N.Y. Grand Jury Subpoena # 86-0351-S*, 811 F.2d 114, 117-118 (1987), the Second Circuit exercised its supervisory authority in refusing to compel the target of an investigation to sign a consent form when the form failed to indicate that it was being executed under compulsion. The court explained, however, that "the [consent] directive would have been properly enforceable * * * if it indicated that it was being executed pursuant to court order" (*id.* at 118). The directive in this case contains such a statement.

Circuit in *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791 (1987). In *Ranauro*, the court of appeals held that an order compelling consent to the disclosure of foreign bank records would violate the Fifth Amendment; the First Circuit thus explicitly "disagree[d] with the *Ghidoni* court's conclusion that the consent directive contained no testimony relevant to the questions of existence of accounts in the witness's name or of control over those accounts" (*id.* at 795).²

This conflict in the circuits is of considerable importance to the administration of criminal justice. Persons engaged in criminal activity have made increasing use of accounts in nations with strict bank secrecy laws to hide funds from law enforcement agencies. During the period from 1977 through August 1983, for example, the Commissioner of Internal Revenue identified 772 tax evasion cases involving offshore transactions. *Crime and Secrecy: The Use of Offshore Banks and Companies*, S. Rep. 99-130, 99th Cong., 1st Sess. 2 (1985). Indeed, the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs recently concluded that foreign banks have been used to "systematically obstruct U.S. law enforcement investigations, erode the public's confidence in our criminal justice system, and thwart the collection of massive amounts of tax revenues" (*id.* at 1). Because compelled consent to the disclosure of foreign bank records is

² The *Ranauro* court also was troubled by the content of the consent form at issue in that case; the form—unlike the one here, or the ones at issue in *Ghidoni* and *Cid*—did not indicate on its face that it was being executed under the compulsion of a court order. See 814 F.2d at 795. The First Circuit therefore exercised its supervisory powers to prevent use of the form (*ibid.*). The court emphasized, however, that its rejection of the holdings of *Ghidoni* and *Cid* did "not rest . . . solely on differences in the wording of the forms" (*ibid.*). It concluded, instead, that the compelled execution of either version of the form would violate the Fifth Amendment (*id.* at 795-796).

one of the most effective means of penetrating foreign bank secrecy, an expeditious resolution of the conflict in the circuits would be appropriate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

JUNE 1987

PETITIONER'S BRIEF

3

No. 86-1753

Supreme Court, U.S.
FILED
NOV 30 1987
JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JOHN DOE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

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37 128

QUESTION PRESENTED

Whether a court order compelling a target of a grand jury investigation to authorize foreign banks to disclose records of his accounts violates the target's Fifth Amendment privilege against self-incrimination.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

—
No. 86-1753
 —

JOHN DOE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—
**On Writ Of Certiorari To The United States
 Court Of Appeals For The Fifth Circuit**
 —

BRIEF FOR THE PETITIONER
 —

OPINION BELOW

The unpublished opinion of the Court of Appeals appears in the appendix to the petition for certiorari. (App. 1a).¹

JURISDICTION

The Court of Appeals entered judgment on February 13, 1987. The petition for a writ of certiorari

¹ On November 2, 1987, the Court granted petitioner's motion to dispense with the filing of a printed appendix. All references to "App." are to the appendix attached to the petition for a writ of certiorari.

was filed May 1, 1987, and was granted October 5, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V:

No person . . . shall be compelled in any criminal case to be a witness against himself

....

STATEMENT OF THE CASE

John Doe is the target of a Southern District of Texas grand jury investigation into alleged manipulation of oil cargos and receipt of unreported income. In October 1983, the grand jury issued two subpoenas to Doe for all records of foreign bank accounts over which he had signatory authority. Doe complied with the subpoenas by appearing before the grand jury on November 16, 1983, and producing bank records. He confirmed in testimony before the grand jury that no additional records responsive to the subpoenas were in his possession or control. When questioned about the existence and location of bank records not in his possession or control, Doe asserted his Fifth Amendment privilege against self-incrimination. (App. 17a).

Eight months after Doe's grand jury appearance, the government filed a motion in the United States District Court for the Southern District of Texas seeking an order compelling Doe to sign forms that would authorize two Cayman Islands banks and one Bermuda bank to disclose records of twelve accounts. The government submitted a proposed "consent" directive

for each account, noting the name on the account and the account number. Doe opposed the motion on the ground that compelling him to execute the directives would violate his Fifth Amendment privilege.

Meanwhile, the government served grand jury subpoenas on the United States branches of the foreign banks, demanding production of records of accounts controlled by Doe. The banks refused to comply with the subpoenas, citing provisions of the bank secrecy laws of the Cayman Islands and Bermuda. The government has not sought contempt sanctions against the banks.

On December 6, 1984, the district court denied the government's motion to compel Doe to execute the consent directives. (App. 16a). The court held that the proposed order would violate the Fifth Amendment by compelling Doe to admit the existence of the records sought by the grand jury and to disclose his signatory authority over the foreign bank accounts. (App. 19a-20a).

The government moved for reconsideration and submitted a revised consent directive, which purports to apply to any and all accounts over which Doe has signatory authority. (App. 12a-13a).² The government

² The consent directive provides:

DIRECTION

I, [John Doe], of the State of Texas in the United States of America, do hereby direct any bank or trust company at which I may have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control

also submitted the affidavit of an Internal Revenue Service special agent summarizing what the grand jury knows about Doe's foreign bank accounts. The affidavit states that 1) the grand jury has linked eleven accounts to Doe based on Doe's filings with the IRS or the records subpoenaed from Doe, and 2) the grand jury has evidence of a twelfth account, in the name of XYZ Co., which it suspects Doe controls.

The district court denied the government's motion for reconsideration. (App. 10a). The court found that Doe's consent might provide the grand jury evidence that Doe controls the XYZ Co. account. (App. 11a). It also found that the revised consent directive might provide an evidentiary link between Doe and other accounts unknown to the grand jury. (App. 12a). The court therefore ruled that an order requiring Doe to sign the directive would compel testimonial self-incrimination.

which relate to said bank account to Grand Jury 84-2, empaneled May 7, 1984 and sitting in the Southern District of Texas, or to any attorney of the United States Department of Justice assisting said Grand Jury, and to give evidence relevant thereto, in the investigation conducted by Grand Jury 84-2 in the Southern District of Texas, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Southern District of Texas issued in connection with the aforesaid investigation, dated _____. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and to any implied contract of confidentiality between Bermuda banks and their customers which may be imposed by Bermuda common law, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

The government appealed, and the United States Court of Appeals for the Fifth Circuit reversed the district court in an unpublished *per curiam* opinion relying on its decision in *In re United States Grand Jury Proceedings (Cid)*, 767 F.2d 1131 (5th Cir. 1985) (App. 5a). Doe filed a petition for certiorari, which respondent opposed solely on the ground that the decision of the Fifth Circuit was interlocutory. This Court denied certiorari. 475 U.S. 1016 (1986).

On May 2, 1986, the district court ordered Doe to execute the consent directive. Doe appeared before the court on August 11, 1986, but declined to comply with the court's order. The district court entered an oral finding of contempt and ordered Doe confined pursuant to 28 U.S.C. § 1826. The court then granted Doe's motion for a stay of sanctions pending appeal and an application for a writ of certiorari. The Fifth Circuit affirmed the finding of contempt. (App. 3a). This Court granted certiorari on October 5, 1987. 56 U.S.L.W. 3204 (U.S. Oct. 5, 1987).

SUMMARY OF ARGUMENT

The privilege against self-incrimination applies in any proceeding, "civil or criminal, administrative or judicial, investigatory or adjudicatory," *Kastigar v. United States*, 406 U.S. 441, 444 (1972), and protects a suspect or witness against compelled testimonial self-incrimination. *United States v. Doe*, 465 U.S. 605, 610 (1984). The fact of compulsion is not in dispute in this case. The district court ordered Doe to execute a consent directive and held him in contempt for his refusal to do so. The issue to be resolved by the Court is whether Doe's execution of the consent directive would be testimonial self-incrimination, which cannot

be compelled, or non-testimonial assistance to the prosecution, which the Fifth Amendment privilege does not reach.

Although it is well established that the government can compel a witness to produce physical evidence, regardless of its potential to incriminate him, this Court has repeatedly confirmed that the Fifth Amendment prohibits the government from compelling any form of communication if it would use the content of the communication to further an investigation or prosecution of the witness. That traditional definition of testimonial self-incrimination is consistent with the policies underlying the privilege, which are not limited to the prohibition of compelled confessions, but also include "requiring the government in its contest with the individual to shoulder the entire load," *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), and guaranteeing an accused "the right 'to remain silent unless he chooses to speak in the unfettered exercise of his will.'" *Schmerber v. California*, 384 U.S. 757, 763 (1966) (quoting *Miranda v. Arizona*, 384 U.S. 436, 460 (1966)). Accordingly, the privilege against self-incrimination extends to all "communications, whatever form they might take," *Schmerber*, 384 U.S. at 763-64, and prohibits the government from compelling any communication, the content of which it could introduce against the defendant or use to obtain other evidence against him. *Kastigar*, 406 U.S. at 445. Under that accepted standard, the order requiring Doe to execute the consent directive violated his privilege against self-incrimination by forcing him to make a declarative statement that would afford the government access to otherwise unobtainable foreign bank records.

The four courts of appeals that have ruled on the constitutionality of compelled consent directives have tacitly assumed that in *Fisher v. United States*, 425 U.S. 391 (1976), this Court abandoned its traditional understanding of the privilege against self-incrimination in favor of a narrow rule that the privilege prohibits only the compulsion of explicit or implicit declarations of fact that have evidentiary significance.³ Nothing in *Fisher* suggests that the Court intended to limit the privilege to the compulsion of factual assertions, which would make the privilege narrower than the policies it reflects. *Fisher* recognized that the privilege protects certain non-verbal acts that have communicative content. It did not address, much less limit, the Fifth Amendment's core protection against compulsion of any form of verbal communication from an accused.

Even if this Court were to endorse the narrow view of the privilege against self-incrimination adopted by the courts of appeals, Doe's execution of the consent directive would nonetheless be testimonial self-incrimination. As the First Circuit acknowledged in *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791 (1st Cir. 1987), the content of a consent directive might be admissible at a criminal trial to prove the defendant's connection to accounts disclosed by a foreign bank in reliance on his purported consent. In

³ See *Two Grand Jury Contemnors v. United States*, 826 F.2d 1166 (2d Cir. 1987), petition for cert. filed sub nom. *Coe v. United States*, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517); *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791 (1st Cir. 1987); *In re United States Grand Jury Proceedings (Cid)*, 767 F.2d 1131 (5th Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984), cert. denied, 469 U.S. 932 (1985).

the instant case, the district court made a finding of fact that the consent directive might be used to link Doe to a particular foreign account, not in his name, which the government believes to be the repository of unreported funds. Under any plausible reading of *Fisher*, that finding compels the conclusion that the executed consent would be testimonial self-incrimination.

In sum, whether this Court adheres to its traditional definition of testimonial self-incrimination or adopts the narrow definition applied by the court below, it should reverse the judgment of contempt against Doe. Because the Fifth Amendment prohibits the compulsion of any form of communication that might lead to incriminating evidence, the compelled consent procedure is, *per se*, unconstitutional. And even assuming that the Fifth Amendment applies only when the content of the compelled communication has evidentiary significance, the court below ignored the district court's determination that the executed consent directive might provide the prosecution an incriminating link between Doe and one or more foreign accounts.

ARGUMENT

THE ORDER BELOW VIOLATES DOE'S PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The Consent Directive Would Be Testimonial Because The Government Could Use Its Content To Further A Criminal Investigation Of Doe.

Doe has been ordered to sign a document, drafted by the prosecutor, containing an affirmative representation of fact: that Doe consents to the disclosure by any bank of records of any accounts upon which

he is authorized to draw. The government wants Doe's signature on that document to signify that he adopts and affirms its content. The government will then use the executed consent directive to persuade one or more foreign banks to release documents that would otherwise be protected by bank secrecy laws. (App. 16a). In short, the government wants the banks to believe the statement in the consent directive and rely upon it as Doe's authorization and instruction to disclose the records to the grand jury.⁴

Under this Court's traditional interpretation of the privilege against self-incrimination, execution of the consent directive would be testimonial self-incrimination that cannot be compelled in the absence of a grant of use immunity. It is not necessary for Doe to show that the content of the consent directive would admit an incriminating fact or otherwise provide information to the government. All that is required is a showing that the directive is a verbal communication and that the government would use the substance of that communication to further its investigation or prosecution of Doe.

1. This Court has described the privilege against self-incrimination as "one of the great landmarks in man's struggle to make himself civilized." *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (quoting E. Griswold, *The Fifth Amendment Today* 7 (1955)). At its core, the privilege prohibits the government

⁴ The fact that the court below ordered Doe to execute a statement prepared by the government rather than to testify orally has no bearing on the Fifth Amendment analysis. Precisely the same self-incrimination issues would be presented by an order that Doe accompany the prosecutor to the bank and recite the content of the consent directive.

from using force or coercion to elicit testimonial evidence of guilt. But this Court has recognized that the privilege also protects broader societal interests of fairness, privacy, and restraint in the exercise of the power of the state. The privilege reflects

our preference for an accusatorial rather than an inquisitorial system of criminal justice; [and] . . . our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load

Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964) (citation omitted). "[T]hese policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens." *Miranda*, 384 U.S. at 460.

The Fifth Amendment privilege is accorded a "liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486 (1951); see *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). Although the Court has not extended the privilege to the logical limits of its underlying values in cases involving the compelled production of non-testimonial evidence, see *Schmerber*, 384 U.S. at 762, it has consistently ruled that the government must obtain evidence against an accused from sources other than his compelled statements. Thus, the Court has recognized that "the privilege is fulfilled only when

the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Id.* at 763 (quoting *Miranda*, 384 U.S. at 460).

Neither the government nor the courts of appeals that have addressed the constitutionality of the compelled "consent" procedure have cited any case in which this Court abandoned the traditional values protected by the Fifth Amendment and allowed the government to compel a verbal communication that would lead to incriminating evidence against the declarant. To be sure, the cases relied upon by the government and the courts of appeals have held that the privilege against self-incrimination is not necessarily violated when an accused is required to assist the prosecution in obtaining evidence. In every such case, however, this Court based its holding that compulsion of a particular form of assistance is constitutional on a determination that the conduct being compelled would entail no communication by the accused whatsoever. For example, in *Holt v. United States*, 218 U.S. 245 (1910), the Court rejected a defendant's claim that his Fifth Amendment privilege was violated when he was required to put on an article of clothing for identification purposes. Justice Holmes, writing for the Court, explained that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.* at 252.

In *Schmerber v. California*, 384 U.S. 757 (1966), the Court adopted Justice Holmes' distinction between compelled communication, which is prohibited

by the Fifth Amendment, and the compelled display of physical characteristics, which is not:

[B]oth federal and state courts have usually held that [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.

Id. at 764 (footnote omitted). Accordingly, the Court ruled that the privilege extends to "an accused's communications, whatever form they might take," *id.* at 763-64, but held that the forced extraction of a blood sample is permissible because it involves no "testimonial compulsion upon or enforced communication by the accused." *Id.* at 765.

The distinction between communication in any form and physical evidence also underlies this Court's holdings that handwriting and voice exemplars are not privileged. In *Gilbert v. California*, 388 U.S. 263 (1967), the Court reasoned:

One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in con-

trast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection.

Id. at 266-67. Likewise, in *United States v. Dionisio*, 410 U.S. 1 (1973), the Court held that the privilege did not extend to compelled voice exemplars because they "were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said." *Id.* at 7.

None of these characterizations of the privilege suggests, as the court below assumed, that a compelled statement or writing need disclose or admit an incriminating fact in order to be testimonial self-incrimination. Rather, they confirm that the privilege applies to any compelled statement or writing sought for its communicative value.

2. The consent directive is no less testimonial because the government seeks to compel Doe's statement as a means to obtain bank records and not for the evidentiary value of its content. Absent a grant of immunity, the government may not compel a witness to make a statement that will allow it to obtain evidence. In *Kastigar v. United States*, 406 U.S. 441 (1972), this Court declared that the privilege against self-incrimination "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Id.* at 445 (emphasis added).

The Court upheld the Federal immunity statute in *Kastigar* because the statute provides protection that is coextensive with the privilege against self-incrimination. *Id.* at 453. The Court also made it clear that

the scope of statutory immunity extends beyond a prohibition against the evidentiary use of compelled testimony. On its face, the immunity statute bars the use against an immunized witness of "any information directly or indirectly derived from" compelled testimony. 18 U.S.C. § 6002. *Kastigar* held that this prohibition against derivative use of compelled testimony forbids the prosecutor from using the statements of an immunized witness "in any respect," *Kastigar*, 406 U.S. at 453 (emphasis in original), and assures that the "compelled testimony can in no way lead to the infliction of criminal penalties." *Id.* at 461. Because the prohibition of derivative use is coextensive with the Fifth Amendment, the privilege plainly reaches any statement that the government seeks to compel as a means of obtaining other evidence.

The holding in *Estelle v. Smith*, 451 U.S. 454 (1981), exemplifies the *Kastigar* principle that a statement without inherent evidentiary value is testimonial for Fifth Amendment purposes if it can be used to obtain evidence. In *Estelle*, a Texas capital murder defendant sought a writ of habeas corpus on Fifth Amendment grounds because a State psychiatrist, who had examined the defendant before trial to determine his mental competency, testified at the penalty phase of the trial about the defendant's propensity to commit violent crimes.⁵ The State argued that the defendant's statements in the psychiatric examination, which were

⁵ Under Texas procedure, a guilty verdict in a capital case is followed by a separate proceeding in which the jury must make a finding on three questions relating to the imposition of capital punishment, one of which is whether the defendant is likely to commit further acts of violence. Tex. Crim. Proc. Code Ann., § 37.071 (Vernon Supp. 1980).

inadmissible at trial,⁶ were non-testimonial because they were used only as a basis for the psychiatrist's diagnosis and not for their content. The Court found that the defendant's statements were testimonial because the psychiatrist used their content, as well as the defendant's failure to make any statement that suggested remorse, to support his expert opinion.⁷ Therefore, the Court ruled that the State's use of the defendant's statements violated his privilege against self-incrimination:

Dr. Grigson's prognosis as to future dangerousness rested on statements respondent made, and remarks he omitted, in reciting the details of the crime. The Fifth Amendment privilege, therefore, is directly involved here because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination.

Id. at 464-65 (footnote omitted).

Under *Kastigar* and *Estelle*, Doe's statement in the consent directive would be testimonial self-incrimination, regardless of its evidentiary significance, because the government could use it to obtain relevant evidence. *Kastigar* makes it plain that the privilege

⁶ Texas law prohibits the state from introducing any statement made by the defendant during the competency examination against him on the issue of guilt. See *Estelle*, 451 U.S. at 463 n.6.

⁷ The Court in *Estelle* questioned whether the psychiatrist would have been able to reach a valid expert opinion if the defendant had refused to answer the psychiatrist's questions. 451 U.S. at 464 n.8.

against self-incrimination shields any communication that might provide a lead to other evidence, and *Estelle* teaches that the privilege is violated when the accused's statements are used to open the door to incriminating evidence. Just as the defendant's non-evidentiary statements in *Estelle* provided a necessary foundation for the psychiatrist's incriminating expert opinion, Doe's representation in the consent directive would cause the bank to provide incriminating documents and testimony that would otherwise not be available to the prosecution.

3. The four courts of appeals that have addressed the compelled consent issue have not applied the Fifth Amendment principles established in *Schmerber*, *Kastigar* and *Estelle*. Rather, they have relied on the mistaken assumption that this Court's decision in *Fisher v. United States*, 425 U.S. 391 (1976), abandoned those principles in favor of a narrow proposition that a compelled statement violates the Fifth Amendment only if it discloses or admits an evidentiary fact.

In *Fisher*, this Court rejected the notion that the Fifth Amendment privilege protects the contents of pre-existing business records, but it recognized that a witness's non-verbal act of producing documents pursuant to a subpoena entails implicit communication that may be protected by the privilege. The Court identified three facts that are tacitly conceded by the act of production: that the subpoenaed documents exist, that they are in the witness's possession and control, and that the documents produced are those described in the subpoena. 425 U.S. at 410.⁸ In *United*

⁸ The documents at issue in *Fisher* were tax records prepared

States v. Doe, 465 U.S. 605 (1983), the Court applied *Fisher's* analysis to hold that a subpoena served on a sole proprietor for his business records compelled testimonial self-incrimination because his act of producing the records would have been an admission that they existed, were in his possession and were authentic. 465 U.S. at 613.

Notwithstanding that *Fisher* and *Doe* involved only the Fifth Amendment consequences of the non-verbal act of producing documents, in *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984), *cert. denied*, 469 U.S. 932 (1985), the court assumed that the rationale of *Fisher* established a boundary to the privilege that applies equally to a compelled verbal communication. The court of appeals below and the Second Circuit have adopted *Ghidoni's* assumption.⁹ Even in *In re*

by the taxpayer's accountant that were delivered to the taxpayer's attorney in the course of an investigation. The Court ruled that the attorney could assert a Fifth Amendment claim on behalf of his client, but it held that whatever testimony might have been implicit in the production of the records was inconsequential since their existence and possession were conceded and they could be authenticated only by the accountant. *See* 425 U.S. at 411-413.

⁹ *See In re United States Grand Jury Proceedings (Cid)*, 767 F.2d 1131 (5th Cir. 1985). The Second Circuit pointed out that the *Ghidoni* approach is based on the assumption that the execution of a consent directive is analogous to the nonverbal act of producing documents:

Thus, the *Ghidoni* court likened the situation before it—where an individual was being compelled to authorize and direct a third party, i.e., banks, to produce documents—to the situations presented in *Doe* and *Fisher*, where an individual was compelled to produce the documents himself.

Two Grand Jury Contemnors v. United States, 826 F.2d 1166,

Grand Jury Proceedings (Ranauro), 814 F.2d 791 (1st Cir. 1987), which held the compelled consent procedure unconstitutional, the court began its analysis with the bald proposition that *Fisher* and *Doe* represent a retreat from the traditional interpretation of the privilege against self-incrimination:

Though the fifth amendment was historically interpreted to protect an accused from being forced to make self-incriminating "communications, whatever form they might take," the Supreme Court has since limited its coverage to compelled incriminating *testimonial* communications. *Fisher*, 425 U.S. at 408. The Supreme Court has indicated that compelled incriminating acts or statements must communicate some assertion, assurance, or admission to fall within the scope of the fifth amendment privilege.

Id. at 792-93 (emphasis in original) (footnote omitted).

The reliance of the courts of appeals on *Fisher* and *Doe* as narrowing the Fifth Amendment's protection of compelled verbal communication is misplaced. *Fisher* and *Doe* are not about compelled verbal communications at all. Rather, they address only the non-verbal act of producing documents, and they extend limited Fifth Amendment protection to that act to the extent that it has communicative aspects. Neither *Fisher* nor *Doe* considers the question whether a communication that does not admit an evidentiary fact might be protected by the privilege. That is because the type of non-verbal communication addressed in

1169 (2d Cir. 1987), *petition for cert. filed sub nom. Coe v. United States*, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517).

Fisher and *Doe*—the act of producing documents—would rarely if ever have incriminating significance other than as a tacit admission of facts about the records produced. To draw from the Court's characterization of the limited scope of the privilege as applied to that non-verbal act a general principle that verbal communications are protected only under analogous circumstances is simply illogical.¹⁰

In concluding that, after *Fisher*, only communications disclosing or admitting a fact fall within the privilege, the courts of appeals must have tacitly as-

¹⁰ In a concurring opinion in *Two Grand Jury Contemnors*, 826 F.2d 1166 (2d Cir. 1987), Judge Newman characterized the logical flaw in the *Ghidoni* analysis of *Fisher* and *Doe* as follows:

The issue in [*Fisher* and *Doe*] was whether the act of producing documents, not itself the making of a statement, might nonetheless be within the privilege as an implied statement of some fact, for example, the fact that the witness has possession or control of the documents. Because the Supreme Court examined the act of production to see if it implied an assertion of fact, some have drawn the inference that a statement that does not assert a fact is not a testimonial communication. This inference is the inverse of the proposition that all assertions of fact are testimonial communications, and, as logicians inform us, an inverse of a proposition is possibly but not necessarily so. See McCall, *Basic Logic* (2d ed. 1952).

In *Fisher* and *Doe* the Supreme Court did not purport to announce a universal test for determining the scope of the privilege. It simply acknowledged that the privilege applies to acts that imply assertions of fact. It did not have occasion to consider the test for determining when the privilege applies to oral or written communications.

826 F.2d at 1173-74 (Newman, J., concurring) (emphasis in original) (footnote omitted).

sumed that *Fisher* modified the holding of *Kastigar v. United States*, 406 U.S. 441 (1972), that the Fifth Amendment protects against any derivative use of compelled testimony. *Kastigar* held that the privilege against self-incrimination is co-extensive with the immunity statute's prohibition against any use of compelled testimony. *Id.* at 453. Under *Kastigar*'s rule, a compelled communication that does not disclose an incriminating fact is testimonial if the government could use it to obtain evidence. An interpretation of *Fisher* that limits the privilege to statements that admit an evidentiary fact would, for example, permit the government to compel the accused to reveal the location of incriminating evidence, then use that evidence at trial, so long as the prosecutor could not inform the jury that the evidence was obtained by virtue of the accused's statement. Nothing in *Fisher* suggests that the Court intended such a narrowing of *Kastigar*'s derivative-use holding.

Moreover, this Court's analysis in *Estelle*, which was decided five years after *Fisher*, is inconsistent with any reading of *Fisher* as a universal rule limiting the Fifth Amendment to evidentiary disclosures. As discussed above, *Estelle* involved the Fifth Amendment implications of the government's use at trial of a psychiatrist's opinion based on inadmissible statements by the defendant in a pre-trial competency examination. Under the courts of appeals' reading of *Fisher*, use of the psychiatrist's opinion would not have violated the defendant's Fifth Amendment privilege because the statements on which it was based were not usable as evidence. However, the Court in *Estelle* did not refer to *Fisher* at all. It rejected the State's argument that the statements were not priv-

ileged because they were nontestimonial and held that the use of the content of the defendant's non-evidentiary communication to obtain the expert's opinion was sufficient to bring the statements within the privilege. *Estelle v. Smith*, 451 U.S. at 463-65.

In sum, there is simply no basis for the key assumption of law that is the starting point for the analysis of the Fifth Amendment consequences of the consent directive by all four courts of appeals that have considered the issue. *Fisher* and *Doe* did not even address, much less materially restrict, the scope of the Fifth Amendment's prohibition of compelled verbal communications.

4. Beyond relying on *Fisher* and *Doe* for the proposition that the consent directive is not testimony unless it admits an evidentiary fact, the government and the lower courts have suggested two other rationales for concluding that execution of the directive would not be testimonial self-incrimination. Neither of these arguments withstands analysis.

One ground urged as a basis for finding that a consent directive is not testimonial is that execution of the directive would be tantamount to "standing aside" so the banks may honor the government's request for production of the records. This rationale is based on a fundamental mischaracterization of the context in which Doe's consent is sought. The government wants to compel Doe to do more than "stand aside." It wants him to intervene on the government's behalf and instruct the banks to produce the records. Thus, the "stand aside" argument ignores the bright line this Court has drawn between protected speech and unprotected conduct by analogizing a testimonial communication to passive, non-verbal acquiescence in

the government's access to evidence. The "stand aside" label cannot legitimize the government's attempt to make Doe speak and, in the process, to conscript Doe as an active participant in his own investigation.¹¹

The "stand aside" rationale clearly proves too much. Assume, for example, that the government had information in this case that there are records of Doe's corporations that are not in Doe's custody or control. The "stand aside" rationale would permit the government to require Doe to state the location of the records or identify the custodian. This Court held in *Curcio v. United States*, 354 U.S. 118 (1987), that such compelled assistance to the government would be testimonial self-incrimination:

¹¹ Doe is not blocking the government from obtaining the bank records. The banks have refused to comply with the subpoenas because to do so would be against the laws of the Cayman Islands and Bermuda. Such foreign laws are not necessarily an impenetrable obstacle to the government's access to foreign bank records. The government has generally been successful in using the powers of United States courts to compel banks subject to foreign secrecy laws to produce subpoenaed records. See, e.g., *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384, 1386 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1290-91 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *In re Grand Jury Proceedings (Field)*, 532 F.2d 404, 410 (5th Cir.), cert. denied, 429 U.S. 940 (1976). Cf. *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984) (upholding imposition of contempt sanctions on a bank for its failure to produce records), cert. denied, 469 U.S. 1106 (1985); but see *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987), and *United States v. First National Bank of Chicago*, 669 F.2d 341 (7th Cir. 1983) (declining to require production of foreign bank records).

The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment.

Id. at 128. Ordering Doe to "stand aside" by stating his consent to the disclosure of the bank records would, likewise, force him to "reveal the contents of his own mind" and "convict himself out of his own mouth" in violation of his Fifth Amendment privilege.¹²

Another rationale proffered for finding the consent directive outside the privilege is that it contains no assertion of fact that could be true or false.¹³ This

¹² One can only imagine the confusion among law enforcement agencies and the resulting Fifth Amendment litigation arising from a rule that the privilege against self-incrimination does not prohibit police efforts to compel citizens to make statements that are tantamount to "standing aside" and allowing access to otherwise unobtainable information, so long as the statements have no independent evidentiary value. Could the police, for example, order a suspect to "stand aside" and permit a search without probable cause by signing a consent directive waiving his Fourth Amendment rights?

¹³ See *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791, 797-98 (1st Cir. 1987) (Breyer, J., dissenting). In *Ghidoni*, the

argument assumes that no communication is "testimonial" unless it could be a lie. No decision of this Court has so construed the privilege against self-incrimination, and such a construction would unconstitutionally narrow the scope of the privilege.

The "truth/lie" rationale ignores the fact that some statements that the government may wish to compel cannot possibly be true or false but are nonetheless testimonial. For example, if a suspect ordered his alleged accomplice to give the police information concerning the offense, or even to confess, the order could neither be true nor false, but the police could surely not compel the suspect to issue such an order.¹⁴ Likewise, in *Schmerber*, the Court suggested in *dicta* that the Fifth Amendment would prohibit the government from requiring a suspect to take a polygraph examination, which would measure physiological responses associated with answers to questions. Though the answers would be true or false, the significance of the examination would be based on measurements that would be neither. Yet the Court in *Schmerber* stated that the physiological responses were "essentially testimonial." *Schmerber*, 384 U.S. at 764.

court hinted at this rationale in describing *Fisher* as limiting the privilege against self-incrimination to instances where the government was relying on the "truthtelling" of the taxpayer. See *Ghidoni*, 732 F.2d at 817 (quoting *Fisher*, 425 U.S. at 411).

¹⁴ The "truth/lie" rationale might also remove from the scope of the privilege all statements that could theoretically be true or false but that the authorities do not seek for the truth of the assertions therein. For example, the prosecutor in *Estelle v. Smith* did not intend to use the defendant's statements to the psychiatrist for the truth of their assertions, but this Court held the statements testimonial. See pp. 14-15, *supra*.

The "truth/lie" construction was drawn from the statement in *Murphy v. Waterfront Commission* that the privilege against self-incrimination reflects our "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt," 378 U.S. at 55. That statement was one of a long list of values underlying the privilege, others of which are unrelated to the issue of whether the compelled testimony could be true or false.¹⁵ Indeed, this Court has identified as the most important principle underlying the privilege the assurance that a suspect may simply remain silent unless and until he chooses to speak. *Miranda*, 384 U.S. at 460. Adoption of the "truth/lie" rationale would require the Court to water down this fundamental precept by adding a caveat that a suspect has no right to remain silent if ordered to make a statement that could neither be true nor false.

5. For the above reasons, the Court should test the constitutionality of the consent directive under the

¹⁵ As the majority in *Ranauro* stated in reply to Judge Breyer's invocation of the truth or falsehood limitation in his dissent:

Our brother dissents on the ground that the order compelling Ranauro to grant his consent does not subject him to the risk of perjury. We doubt that such a risk is always a prerequisite to invocation of the privilege. The Court in *Murphy v. Waterfront Commission* noted "the cruel trilemma" (self-accusation, perjury, or contempt) as one of no fewer than seven "fundamental values" that are reflected by the privilege. That the risk of perjury is not always present is illustrated by perhaps the most blatant imaginable example of a fifth amendment violation, where a court orders a suspect to either swear to a prepared confession or suffer the penalties of contempt.

814 F.2d at 794 (footnote and citation omitted).

traditional interpretation of the Fifth Amendment enunciated in *Schmerber*, *Kastigar* and *Estelle*: The privilege prohibits the compulsion of a statement, whether or not the statement discloses or admits an evidentiary fact, if its content can be used by the prosecutor to further a criminal case. Because the executed consent directive would be a compelled statement by Doe and its content would be used to obtain potentially incriminating evidence from the banks, the order of the district court violated Doe's Fifth Amendment privilege.

B. Even If The Privilege Were Limited To Communications With Evidentiary Significance, This Consent Directive Would Be Testimonial Self-Incrimination.

1. The Fifth Amendment analysis in *Ghidoni* focused on the question whether the consent directive admitted any evidentiary facts. *Ghidoni* relied on *Fisher* and *Doe* for the proposition that a compelled communication must admit a relevant fact in order to come within the privilege. 732 F.2d at 818. For the reasons discussed in Part A, *Fisher* and *Doe* address only the Fifth Amendment consequences of the non-verbal act of producing documents, and so there is no basis for drawing from their holdings a general rule that the privilege does not apply to compelled verbal communications with no evidentiary significance.¹⁶ However, even reading *Fisher* and *Doe* as establishing a universal test applicable to all forms of compelled communication, the court below erred in determining that the consent directive would not be testimonial self-incrimination.

¹⁶ See pp. 16-21, *supra*.

In *Ghidoni*, the court limited its analysis of the potential evidentiary significance of the consent directive to the three potentially incriminating consequences of compelled document production that this Court identified in *Fisher*. Thus, it noted that the directive was not evidence of the existence of any accounts; the directive did not aver that the witness controlled any foreign accounts; and, since only the banks could authenticate the records produced, the directive implied no admission of authenticity. *Ghidoni*, 732 F.2d at 818-819. Once it concluded that the consent directive made none of the representations identified in *Fisher*, the *Ghidoni* court held as a matter of law that the directive had no possible evidentiary significance and thus was not a testimonial communication. *Id.* at 819.

The Eleventh Circuit's superficial approach in *Ghidoni* to the issue of testimonial self-incrimination ignored the analytical underpinnings of *Fisher* and *Doe*. In *Fisher*, the Court started from the proposition that a compelled non-verbal act has "communicative aspects of its own." 425 U.S. at 410. Applying that general principle, the Court identified three implicit admissions that may result from the act of producing records: existence, possession, and authenticity. *Id.* On the basis of the record in *Fisher*, the Court concluded that none of those admissions had evidentiary significance, because the records were not prepared by the witness and the government knew that they existed and were in his possession. *Id.* at 411. In *Doe*, the Court concluded that the admissions implicit in a sole proprietor's production of business records might provide information to the government and were, therefore, testimonial. 465 U.S. at 613. In neither

case did the Court purport to restrict the privilege to circumstances in which a witness's compelled act would admit the authenticity, existence, or possession of records. To the contrary, the Court specifically recognized in *Fisher* that the issues involved in determining whether a non-verbal act would result in testimonial self-incrimination do not lend themselves to "categorical answers" and that "their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." 425 U.S. at 410.

The facts of *In re Katz*, 623 F.2d 122 (2d Cir. 1980), illustrate that the act of producing documents can have evidentiary significance beyond the admission of existence, possession or authenticity. Katz was a lawyer whose client, Jamil, was suspected of controlling a number of corporations whose certificates of incorporation would not, on their face, reveal his connection. A grand jury subpoena demanded that Katz produce all records of corporations related to Jamil. Jamil intervened in the district court to assert his Fifth Amendment privilege.¹⁷ The Second Circuit applied the *Fisher* rational and determined that, given the government's suspicion, compliance with the demand of the summons might involve testimonial self-incrimination:

Thus, if as the government suspects, Katz has in his custody certain certificates of incorporation listing only dummy incorporators

¹⁷ When a subpoena served on an attorney seeks production of records of his client that fall within the attorney-client privilege, the client's Fifth Amendment privilege applies to the attorney's act of production. See *Fisher*, 425 U.S. at 405.

and not facially indicating any ownership or control by Jamil, their very production under compulsion may be a testimonial and incriminating communication. The act of turning over the documents would constitute a communication by Katz to the effect that taxpayer was connected with the corporations.

Id. at 126 (footnote omitted).

Surely the Second Circuit was correct in interpreting *Fisher* as requiring an inquiry into the possible evidentiary significance of the particular compelled communicative act at issue in *Katz*. By the same token, the court in *Ghidoni* should have asked whether the compelled execution of a consent directive has any possible evidentiary significance in the investigation or prosecution of the declarant, rather than limit its inquiry to the narrow question whether the language of the consent directive admitted existence, possession or control.

The First Circuit asked the right question in *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791 (1st Cir. 1987), and concluded that a consent directive can have evidentiary significance. The court recognized that, notwithstanding the directive's hypothetical language, it might be admissible at trial to prove the defendant's control over the accounts. The court also described a circumstance under which the directive might be the only evidence of the defendant's control over one or more accounts:

Suppose that at trial the government were to introduce bank records produced in response to a subpoena that had been accompanied by the consent form and that it was

not apparent from the face of the records or otherwise how [the signator] was linked to them. Suppose also that the government then introduced the subpoena and the consent form, and a government witness testified that the bank records were received in response to the subpoena and consent form. Would not the evidence linking [the signator] to the records be his own testimonial admission of consent? We believe it would.

Id. at 793. Thus, the court correctly ruled that the consent directive entailed potential testimonial self-incrimination because its content might be admissible in evidence against the signator and, indeed, might be the only evidentiary link between the signator and one or more foreign bank accounts.¹⁸

2. Under the standard announced in *Hoffman v. United States*, 341 U.S. 479 (1951), the privilege against self-incrimination applies to a compelled tes-

¹⁸ In *Two Grand Jury Contemnors v. United States*, 826 F.2d 1166 (2d Cir. 1987), petition for cert. filed sub nom. *Coe v. United States*, 56 U.S.L.W. 3327 (U.S. Sept. 30, 1987) (No. 87-517), the Second Circuit declined to follow *Ranauro* and held that a compelled consent directive is not testimonial. In so ruling, it rejected the reasoning of its two earlier decisions in which it had apparently found consent directives to be testimonial but had held that the government could compel their execution so long as it was prohibited from introducing the directives themselves in evidence. See *id.* at 1170-71; *In re N.D.N.Y. Grand Jury Subpoena*, 811 F.2d 114, 117 (2d Cir. 1987); *United States v. Davis*, 767 F.2d 1025, 1040 (2d Cir. 1985). The court made it clear in *Two Grand Jury Contemnors* that it saw merit in the First Circuit's approach in *Ranauro* but felt constrained to follow the results of its prior decisions. See 826 F.2d at 1170, and at 1173-75 (Newman, J., concurring).

timonial communication unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the . . . answers cannot possibly have . . . [a] tendency to incriminate." *Id.* at 488, quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881) (emphasis in *Hoffman*). See also *Brown v. Walker*, 161 U.S. 591, 597 (1896). Thus, whenever a communication that the government seeks to compel could conceivably have incriminating evidentiary significance, the district court must either uphold the privilege or grant the witness an opportunity to demonstrate, *in camera*, that his fear of incrimination is reasonable. *Hoffman*, 341 U.S. at 486-87. At such a hearing, the burden would be on the witness to establish a "substantial and real" likelihood that the communication would lead to incrimination. See *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980), quoting *Marchetti v. United States*, 390 U.S. 39, 53 (1968).

While it may be a rare case in which a witness could show a substantial risk of incrimination resulting from a consent directive, see *Ranauro*, 814 F.2d at 797 (Breyer, J., dissenting), this is such a case. In proceedings before the district court, the government submitted an affidavit of an IRS special agent and other evidence showing that Doe controlled eleven foreign bank accounts. As to a twelfth account, in the name of the XYZ Co., the affidavit states that the grand jury suspects, but cannot prove, that Doe controlled the account. In denying the government's motion for reconsideration, the district court specifically found that the consent directive would provide the government an evidentiary link between Doe and the XYZ Co. account and that it might provide an analogous link between Doe and other accounts of

which the grand jury is unaware. (App. 12a-13a, 14a). Thus, the court found on the evidentiary record of this case precisely the incriminating circumstances about which the First Circuit speculated in *Ranauro*. Under the *Hoffman* test, the possibility of incrimination should be deemed established.

CONCLUSION

The Court should reverse the judgment of the court of appeals and remand the case to the district court with instructions to reverse its finding of contempt and to dismiss the government's motion to compel.

Respectfully submitted,

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RESPONDENT'S

BRIEF

(5)

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a court order requiring petitioner to consent to the disclosure of certain foreign bank records violates the Fifth Amendment privilege against compulsory self-incrimination.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. A prior opinion of the court of appeals in this case (Pet. App. 5a-7a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1987. The petition for a writ of certiorari was filed on May 1, 1987, and was granted on October 5, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part:

No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

Petitioner is the subject of an investigation being conducted by a grand jury sitting in the Southern District of Texas. On November 16, 1983, petitioner appeared before the grand jury pursuant to a subpoena that directed him to produce records of transactions in accounts at three banks in the Cayman Islands and Bermuda. Petitioner produced some of the requested records and testified that he neither possessed nor controlled the other documents sought by the grand jury. When questioned about the existence or location of additional records, however, petitioner asserted his Fifth Amendment privilege against compulsory self-incrimination. Pet. App. 17a.¹

The laws of Bermuda and the Cayman Islands prohibit the disclosure of bank records without the bank customer's consent. Therefore, on July 2, 1984, the government moved the district court to order petitioner to consent to the disclosure of records relating to any accounts that he held or controlled at the three foreign banks. The government subsequently submitted proposed consent forms for each of 12 foreign bank accounts; the consent forms provided account numbers for each of those accounts and described the documents that the government wished the banks to produce. See Supp. Materials to Motion and Memorandum to Compel Doe to Consent to Disclosure of Records.

The district court denied the motion (Pet. App. 16a-28a). The court reasoned that petitioner's consent to disclosure would amount to an admission both that the bank records existed and that petitioner "exercised signatory authority over such accounts" (*id.* at 19a-20a (footnote omitted)). The court therefore held that compel-

¹ The United States branches of the foreign banks also were served with subpoenas directing them to produce petitioner's bank records. Citing the bank secrecy laws of their governments, the banks refused to comply. See Pet. App. 17a n.2.

ling petitioner's consent to release of the records would violate his Fifth Amendment privilege against compulsory self-incrimination (*id.* at 20a-21a).

The government sought reconsideration of the district court's order. Along with its motion, the government submitted a proposed consent form for petitioner to sign that was substantially the same as the form approved in *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), cert. denied, 469 U.S. 932 (1984). By signing that form, petitioner would "direct any bank or trust company at which [he] may have a bank account of any kind * * * to disclose all information and deliver copies of all documents of every nature in [the bank's] possession or control which relate to said bank account to Grand Jury 84-2." The form also stated that "[t]his direction has been executed pursuant to * * * order of the United States District Court for the Southern District of Texas." Pet. App. 12a n.5.² The district court declined to follow *Ghidoni* and again denied the government's motion. The court stated that "execution of the consent form would be a compelled testimonial communication" (*id.* at 14a) that might provide the "necessary link" connecting petitioner to certain accounts (*id.* at 13a).

Relying on its intervening decision in *In re United States Grand Jury Proceedings (Cid)*, 767 F.2d 1131 (1985), the court of appeals reversed (Pet. App. 5a-7a). The court of appeals explained that the execution of a consent form such as the one at issue in this case does "not have testimonial significance" (*id.* at 7a), so that an order com-

² The government's motion for reconsideration was presented with an affidavit from an Internal Revenue Service agent that provided evidence connecting petitioner to a number of suspect accounts; the agent acknowledged, however, that "as to at least one of the known accounts of which [the government] seeks bank records, there exists only speculation as to [petitioner's] involvement with the account" (Pet. App. 11a (footnote omitted)).

elling execution of the form does not implicate the Fifth Amendment.

On remand, the district court ordered petitioner to appear before the grand jury and to execute the consent forms. Petitioner appeared, but he refused to sign the forms. The court accordingly held petitioner in contempt and ordered him confined until he consented to the disclosure of the bank records. Pet. App. 2a. The district court stayed imposition of the sanction to give petitioner an opportunity to appeal (*id.* at 2a-3a). The court of appeals affirmed the contempt sanction; it rejected petitioner's Fifth Amendment argument based on its prior decision in the case (*id.* at 3a-4a).

SUMMARY OF ARGUMENT

1. This Court has made it clear that the Self-Incrimination Clause may be asserted only to prevent the compulsion of incriminating "testimonial communications"—in other words, only when the government seeks to compel the accused to make an assertion, explicit or implicit, that will further the government's investigation. That principle underlies the Court's holding that suspects may be required to furnish blood samples or handwriting and voice exemplars, or may be directed to stand in a lineup or wear particular clothing; suspects who are compelled to make such statements or take such actions have not done anything "sufficiently testimonial for purposes of the privilege." *Fisher v. United States*, 425 U.S. 391, 411 (1976). The Court reaffirmed that principle in its more recent decisions holding that suspects may assert their privilege in resisting requests for business records if—but only if—the act of producing the records would have both testimonial aspects and an incriminating effect.

An act or statement is not "testimonial" merely because it may be useful as evidence or may be used to obtain evidence from a third party. The Court's decisions affirm-

ing the constitutionality of compelled blood samples and handwriting exemplars stand squarely for the proposition that a defendant may be required to submit to or engage in conduct that facilitates the government's discovery of evidence. Those cases hold that a suspect may be directed to provide (or even manufacture) incriminating evidence, as long as he is not compelled to make a testimonial statement. And compelling a suspect to engage in conduct that facilitates the production of evidence by a third party, as in this case, is less incriminating (and certainly no more testimonial) than requiring him to produce the evidence himself.

2. The compelled consent at issue in this case is not a testimonial statement. The consent form does not communicate facts; rather, it is a verbal act that directs the recipient banks to do something. The form is sought only for its legal effect, not for the truth of any assertion contained within it. Moreover, by signing the form, petitioner makes no statement, either explicit or implicit, about the existence of foreign accounts or about his control over any such accounts. The form simply indicates that petitioner will not object to the release of any records that *may* exist. As a result, if the government obtains bank records after petitioner signs the form, the only factual statement made by anyone will be the *bank's* implicit declaration that *it* believes the accounts to be petitioner's. Petitioner's signature on the form thus serves only to remove a non-constitutional impediment imposed by foreign law on the delivery of bank records. Signing the form is an act that may ultimately result in the production of evidence against petitioner, but it is not a testimonial communication, and it is therefore not protected by the Fifth Amendment.

ARGUMENT

THE FIFTH AMENDMENT IS NOT VIOLATED WHEN A PERSON IS COMPELLED TO CONSENT TO THE DISCLOSURE OF BANK RECORDS HELD BY A THIRD PARTY

It is common ground between the parties in this case that the business records sought by the government are not themselves protected by the Fifth Amendment. As this Court has stated, "a person inculcated by materials sought by a subpoena issued to a third party cannot seek shelter in the Self-Incrimination Clause of the Fifth Amendment." *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742-743 (1984). See *Couch v. United States*, 409 U.S. 322, 328-329 (1973). The Court has made it clear, in particular, that the Fifth Amendment does not come into play when a bank is directed to provide records of customer accounts to the government. See generally *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974); cf. *United States v. Miller*, 425 U.S. 435, 442-443 (1976). And foreign bank secrecy laws provide no privacy rights for United States citizens that are not otherwise present under the Constitution and laws of the United States. *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980).³ The only question in this case,

³ Foreign banks that do business in the United States may be ordered to produce subpoenaed records located in foreign offices. See, e.g., *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983); *In re Marc Rich & Co., A.G.*, 707 F.2d 663 (2d Cir.), cert. denied, 463 U.S. 1215 (1983); *United States v. Vetco Inc.*, 644 F.2d 1324, 1330 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979); *In re Grand Jury Proceedings*, 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976); *In re Grand Jury 81-2*, 550 F. Supp. 24 (W.D. Mich. 1982); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 116 (S.D.N.Y. 1981). On the other hand, determining whether a foreign bank may be required to produce confidential records in violation of its domestic

then, is whether requiring petitioner to place his signature on a form consenting to the release of bank records that may be held by foreign banks is inconsistent with the Fifth Amendment. As this Court's decisions make clear, the court of appeals answered that question correctly.

A. The Fifth Amendment Comes Into Play Only When the Government Compels a Person to Make an Incriminating Testimonial Assertion

1. The Fifth Amendment does not erect a general bar against government efforts to obtain information from a suspect in a criminal case. Rather, in order to fall within the privilege against compulsory self-incrimination, a disclosure must be (1) compelled, (2) incriminating, and (3) testimonial. See *United States v. Doe*, 465 U.S. 605, 612 (1984); *Fisher v. United States*, 425 U.S. 391, 408 (1976). There is no question that the execution of the consent form at issue in this case would be compelled: the district court ordered petitioner to execute the form over his objection. It can likewise be assumed that the execution of the consent form will assist the government in obtaining incriminating information; certainly, its purpose is

law involves an application of principles of international law and comity that turns on the facts of each case (see generally *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985)); as a result, the account holder's consent may be necessary to obtain records from a bank domiciled in a country that has a bank secrecy law. Citing a recent decision of the Grand Court of the Cayman Islands, amicus Government of the Cayman Islands maintains that a compelled consent such as the one at issue in this case would be ineffective under Cayman law (Br. 9-11 (citing *In re Application by ABC, Ltd. under the Confidential Relationships (Preservation) (Amendment) Law, 1979*, [1984] C.I.L.R. 130)). The cited decision was not appealed, however, and Cayman law on the point accordingly has not been definitively settled. In any event, the effectiveness of the consent under foreign law—and the associated questions of comity discussed by amicus (Br. 13-16)—have no bearing on the constitutional issue here.

to help the government obtain evidence that will be useful in a criminal investigation of petitioner. Thus, the question on which this case turns is whether the act of executing the consent form is testimonial in nature.

Testimonial communications are statements that relate a factual assertion, either explicitly or implicitly, and in that way "rely[] on the 'truthtelling' of the [suspect]" (*Fisher*, 425 U.S. at 411 (citation omitted)). As the Court has explained, it is this "extortion of information from the accused" (*Couch v. United States*, 409 U.S. 322, 328 (1973)), and the concomitant attempt to force him "to disclose the contents of his own mind" (*Curcio v. United States*, 354 U.S. 118, 128 (1957)), that implicate the Self-Incrimination Clause. If petitioner's signature on the consent form does not constitute an assertion which the government may use to further its investigation, compelling him to place his signature on the form will not, in the language of the Fifth Amendment, make him "a witness against himself."

The principle that the Fifth Amendment privilege may be asserted only when a person is being asked to disclose knowledge that could incriminate him—when he is in some sense asked to be a "witness"—has been expressed repeatedly by the Court. It underlies the Court's decisions that suspects may be compelled to furnish blood samples (see *Schmerber v. California*, 384 U.S. 757 (1966)) or handwriting and voice exemplars (see *United States v. Dionisio*, 410 U.S. 1 (1973); *Gilbert v. California*, 388 U.S. 263 (1967)), or may be directed to stand in a lineup or wear particular clothing (see *United States v. Wade*, 388 U.S. 218 (1967); see also *Holt v. United States*, 218 U.S. 245 (1910)). Those decisions were grounded on the proposition that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature" (*Schmerber*, 384 U.S. at 761 (footnote

omitted)). The privilege accordingly was held not to come into play in those cases, because the suspects were not required "to disclose any knowledge [they] might have" (*Wade*, 388 U.S. at 222). See *Dionisio*, 410 U.S. at 7; *Gilbert*, 388 U.S. at 266-267. As the Court has explained more recently, a suspect who is compelled to furnish a handwriting sample may well incriminate himself, but "his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege." *Fisher*, 425 U.S. at 411; see *id.* at 432 (Marshall, J., concurring in the judgment).

The Court confirmed this approach to the interests protected by the privilege in *Fisher v. United States*, *supra*, and *United States v. Doe*, *supra*. In those cases, the Court held that a suspect may assert the Fifth Amendment in resisting a subpoena or summons seeking business records, but only if the act of producing the records would have both "testimonial aspects and an incriminating effect" (*Doe*, 465 U.S. at 612). This emphasis on "testimonial self-incrimination" (*id.* at 613; see *Fisher*, 425 U.S. at 409) is hardly a special rule for nonverbal communications, as petitioner suggests (Br. 18-19). To the contrary, the decisions in *Fisher* and *Doe* rested on the understanding that "the Court has *never* on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort." *Doe*, 465 U.S. at 611 n.8 (quoting *Fisher*, 425 U.S. at 399 (emphasis added)). Citing the *Schmerber* line of cases, the Court thus squarely held in *Fisher* that the Fifth Amendment comes into play "only when the accused is compelled to make a *testimonial* communication that is incriminating" (425 U.S. at 408 (emphasis in original); see *id.* at 409; *Doe*, 465 U.S. at 611, 613).

It is entirely consistent with the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled testimonial disclosures of information. The Court has repeatedly explained that "[t]he 'historic function' of the privilege has been to protect a 'natural individual from compulsory incrimination through his own testimony or personal records.'" *Andresen v. Maryland*, 427 U.S. 463, 470-471 (1976) (citations omitted); see also 8 J. Wigmore, *Evidence* § 2283, at 378-379 (McNaughton rev. ed. 1961). That purpose is fulfilled when the Fifth Amendment prevents the government from compelling the accused to acknowledge his guilt or otherwise to reveal his knowledge about the offense; the Self-Incrimination Clause in that way reflects "a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Ullmann v. United States*, 350 U.S. 422, 427 (1956) (citation omitted). See *Couch*, 409 U.S. at 327; *Bellis v. United States*, 417 U.S. 85, 88 (1974). Similarly, the subsidiary policies that underlie the central historic function served by the Self-Incrimination Clause—protection of the accused from "the cruel trilemma of self-accusation, perjury or contempt," insistence that the government shoulder the burden of proving its case, distrust of self-deprecatory statements, and the like (see *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964))⁴—are most

⁴ In its discussion of the policies underlying the privilege, the Court in *Murphy* explained that "[i]t reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause

directly served when the privilege is asserted to spare the accused from having to reveal his knowledge of the offense or from having to share his thoughts with the government.

In arguing that the Self-Incrimination Clause is not limited to preventing the compelled production of incriminating assertions, petitioner cites (Br. 10) a portion of this Court's opinion in *Murphy* that suggests that the privilege reflects "our preference for an accusatorial rather than an inquisitorial system of criminal justice; [and] . . . our sense of fair play which dictates a fair state-individual balance." But that snippet from *Murphy* does not establish the broad proposition for which petitioner cites it. *Schmerber* and its progeny make clear that it is not inconsistent with our accusatorial system of justice to compel the accused to take steps that advance the government's investigation, as long as he is not required to disclose incriminating information within his possession. The decisions in those cases recognize that confining the privilege to testimonial disclosures leaves the burden on the government to discover its evidence from a source other than the accused, and thus to "shoulder the entire load" of establishing guilt (*Murphy*, 378 U.S. at 55 (citation omitted)). Such a system is both non-inquisitorial and even-handed; if the government is required to prove its case without testimony from the accused, he has not been not made "a witness against himself." See generally *Andresen*, 427 U.S. at 477.⁵

is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" 378 U.S. at 55 (citations omitted).

⁵ Nothing about the adversarial system of justice suggests that neither party may obtain probative evidence from the other. "The need

2. Petitioner contends that "the consent directive [at issue here] would be testimonial self-incrimination, regardless of its evidentiary significance, because the government could use it to obtain relevant evidence" (Br. 15). But the contention that an act or statement may be "testimonial" even though it lacks any factual content is a strange one, and it does not accord with this Court's use of the term. In fact, the Court has never held that a compelled action or statement that is not *itself* testimonial—that is, that does not itself either explicitly or implicitly disclose information—may be shielded by the Fifth Amendment privilege simply because it assists the government in obtaining evidence. See *Schmerber*, 384 U.S. at 764 (citation omitted) (while "the privilege is a bar against compelling 'communications' or 'testimony,' a compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it").

When a suspect is required to don clothing worn by the perpetrator of a crime, for example, his compelled conduct certainly helps the government obtain evidence from eyewitnesses. Similarly, other forms of "compelled evidence, such as handwriting examples, fingerprints, and blood samples, lead[] to the development of highly incriminating testimony, but compulsion of such evidence

to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974). See *Kastigar v. United States*, 406 U.S. 441, 443-444 (1972). The Court has interpreted the Self-Incrimination Clause with sensitivity to that point. See generally *Couch*, 409 U.S. at 336. As Justice Brennan has noted, "it is clear that the scope of the privilege does not coincide with the complex of values it helps to protect. Despite the impact on the inviolability of the human personality, and upon our belief in an adversary system of criminal justice * * * the prosecution is allowed to obtain and use * * * evidence which although compelled is generally speaking not 'testimonial.'" *Grosso v. United States*, 390 U.S. 62, 72-73 (1968) (citation omitted) (Brennan, J., concurring).

does not violate the privilege." *In re Grand Jury Subpoena*, 826 F.2d 1166, 1172 n.2 (2d Cir. 1987) (Newman, J., concurring), petition for cert. pending, No. 87-517. And if the compelled conduct or statement is not itself testimonial, "it cannot become so because it will lead to incriminating evidence" (*ibid.*).

Petitioner nevertheless complains that the compelled consent form might "cause the bank [that receives it] to provide incriminating documents and testimony" (Br. 16). But compelling a suspect to make a statement that facilitates the production of evidence by someone else obviously is less incriminating (and certainly is no more testimonial) than requiring him to produce the evidence himself—a requirement that the Court has repeatedly held may be imposed upon a suspect. And petitioner offers absolutely no rationale to support his assertion that a nontestimonial verbal statement directed to a third party is transformed into something that is protected by the Fifth Amendment when it assists the government's case, while the suspect's own nontestimonial act is not.⁶

Petitioner also cites two of this Court's decisions, *Kastigar v. United States*, 406 U.S. 441 (1972), and *Estelle v. Smith*, 451 U.S. 454 (1981), for the proposition that "the government may not compel a witness to make a statement that will allow it to obtain evidence" (Br. 13). In

⁶ As petitioner recognizes (Br. 17-18), every court of appeals that has considered cases involving compelled consent forms has held that the privilege shields only testimonial communications—those that provide incriminating information. See *In re Grand Jury Subpoena*, 826 F.2d at 1168; *In re Grand Jury Proceedings (Runauro)*, 814 F.2d 791, 792-793 (1st Cir. 1987); *id.* at 797 (Breyer, J., dissenting); *In re N.D.N.Y. Grand Jury Subpoena*, 811 F.2d 114, 116 (2d Cir. 1987); *In re United States Grand Jury Proceedings (Cid)*, 767 F.2d 1131 (5th Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814, 816 (11th Cir.), cert. denied, 469 U.S. 932 (1984).

fact, however, those decisions confirm that the Fifth Amendment shields *only* statements that are testimonial in character, *i.e.*, statements that convey information. *Kastigar* affirmed the constitutionality of 18 U.S.C. 6002 and 6003, which permit the government to compel testimony as long as the witness is immunized against use of the "testimony or other information" provided. In holding that the immunity provided by Sections 6002 and 6003 is coextensive with the Fifth Amendment, the Court necessarily concluded that the privilege protects only against "compelled testimony." 406 U.S. at 453-454. Indeed, a central precept of the decision in *Kastigar* was that the privilege "protects against any *disclosures* that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used" (*id.* at 445 (emphasis added; footnote omitted)).⁷

Petitioner is also incorrect in citing *Estelle* for the proposition that "a statement without inherent evidentiary value is testimonial for Fifth Amendment purposes if it can be used to obtain evidence" (Br. 14). *Estelle* involved the use at the defendant's trial of statements improperly elicited from the defendant by a state psychiatrist. Holding that the State may not use compelled testimony to subject a defendant to a criminal penalty (see 451 U.S. at 462), the Court concluded that the defendant's Fifth Amendment privilege had been violated "because the State used as evidence against [the defendant] the *substance of his disclosures* during the pretrial psychiatric examination" (*id.* at 464-465 (emphasis added)). The Court found a Fifth Amendment violation in *Estelle* not because the defendant's acts or nontestimonial statements were used to obtain evidence against him, but because the statements

⁷ The Court has subsequently characterized *Kastigar* as holding that "disclosure of private information may be compelled if immunity removes the risk of incrimination" (*Fisher*, 425 U.S. at 400).

that were compelled were themselves testimonial and incriminating: they constituted disclosures of facts by the defendant that were offered by the State as "affirmative evidence" to be considered in setting his punishment (*id.* at 466).

B. The Compelled Consent Form at Issue Here is not Testimonial and has no Evidentiary Value

1. Throughout his brief, petitioner refers to the consent form as a "communication" (see, *e.g.*, Br. 9, 11). His theory is that the "content" of the form will be "communicated" to foreign banks that will, in turn, provide the government with evidence (Br. 8-9, 26). But this use of the word "communication" is misleading. The consent form does not communicate facts at all; it *directs* the recipient banks to do something. The form is sought only for its legal effect. Because it indicates on its face that it was signed pursuant to a court order (see Pet. App. 12a n.5), the form sheds no light on petitioner's actual intent or state of mind. As Judge Breyer explained of a virtually identical consent form, the signator "does not 'assert' consent (nor does he 'admit' consent or 'assure' consent); rather, he performs a verbal act: he *grants* consent." *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791, 798 (1st Cir. 1987) (emphasis in original) (Breyer, J., dissenting).⁸ Indeed, whether or not the form can be characterized as a

⁸ This is hardly a novel conclusion; courts have routinely held that instructions or orders from one person to another are verbal acts that are "neither true nor false" and therefore cannot be excluded from evidence as hearsay. *United States v. Shepherd*, 739 F.2d 510, 514 (10th Cir. 1984). See *United States v. Miller*, 771 F.2d 1219, 1233 (9th Cir. 1985); *United States v. Tuchow*, 768 F.2d 855, 868 (7th Cir. 1985); *United States v. Gibson*, 675 F.2d 825, 834 (6th Cir.), cert. denied, 459 U.S. 972 (1982); *United States v. Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976).

"communication" to the banks ultimately is beside the point: the Self-Incrimination Clause can come into play only if the form is testimonial. See *Fisher*, 425 U.S. at 410-412 (while act of production has "communicative aspects," the Fifth Amendment is implicated only if the communication is testimonial).

The form itself is not "testimonial." It does not "communicate" any facts, and it is not sought for—and does not have—evidentiary value. By signing the form, petitioner makes no statement, either explicit or implicit, about the existence of foreign accounts, or about his control over any such accounts. The form simply indicates that petitioner will not object to the release of any records that *may* exist. And it does not "restate, repeat, or affirm" the contents of any records that subsequently are provided by a bank (*Fisher*, 425 U.S. at 409). There is thus "no incriminating testimony in the contents of the directive or the fact that [petitioner] must sign." *United States v. Ghidoni*, 732 F.2d 814, 817 n.4 (11th Cir.) (emphasis in original), cert. denied, 469 U.S. 932 (1984).

Instead, as three of the four courts of appeals that have considered the issue have recognized, "the directive merely permits the bank to disclose information relating to any accounts with respect to which the *bank records* indicate [the signator's] authority to draw (*i.e.*, any accounts with respect to which the bank *thinks* [the signator] has authority)" (*Ghidoni*, 732 F.2d at 818 (emphasis in original)).⁹ As a result, if the government obtains bank records after petitioner signs the form, the only factual statement made by anyone will be the *bank's* implicit declaration that *it* believes the accounts to be petitioner's.

⁹ See also *In re United States Grand Jury Proceedings (Cid)*, 767 F.2d 1131, 1132 (5th Cir. 1985); *In re Grand Jury Subpoena*, 826 F.2d at 1170. But see *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791 (1st Cir. 1987).

Compare *Fisher*, 425 U.S. at 410, 412-413. As in *Fisher*, the government thus "is relying in no way on the 'truth-telling' of the [signator] to prove the existence of or his access to the documents" (*id.* at 411 (citation omitted)).

Similarly, while the executed form allows the government access to a potential source of evidence, the form itself does not provide the government with any information it did not already have. The form does not point the government toward hidden accounts or otherwise provide any information that will assist the prosecution in uncovering evidence; the form therefore does not in any way relieve the government of its burden of discovering prosecution evidence "by the independent labor of its officers." *Estelle*, 451 U.S. at 462 (citation omitted).¹⁰ For similar reasons, petitioner's signature on the form would not authenticate any records provided by the bank: the form does not express any view on the authenticity of the documents, and petitioner—who did not prepare the records—could not, in any event, vouch for their accuracy. See *Ghidoni*, 732 F.2d at 818-819. See generally *Fisher*, 425 U.S. at 413; Fed. R. Evid. 901.

At bottom, petitioner's signature on the consent form simply removes a nonconstitutional impediment imposed by foreign law on the production of third party documents. In arguing that he should not be compelled to remove this impediment, petitioner seeks the protection of the Fifth Amendment for records of accounts that have been (or will be) discovered by the government through its own efforts, and that are not themselves privileged—even though his action in waiving the protection of foreign law

¹⁰ Because the form provides no information about where petitioner's hypothetical accounts are located, the government will have to identify banks that hold the accounts and serve the banks with subpoenas; the consent form, when forwarded along with a subpoena, will (if it is effective under local law) simply make it possible for the recipient bank to comply with the government's request.

would not, in itself, reveal anything or add anything to the government's case. Nothing in the language or policy of the Fifth Amendment requires such a result.

Petitioner challenges (Br. 21-23) the proposition that he is simply being asked to remove an impediment to the production of evidence, asserting that the government is seeking to compel him to do more than "stand aside" and demonstrate "passive, nonverbal acquiescence in the government's access to evidence" (*id.* at 21-22). But a suspect who is directed to create a handwriting or voice exemplar obviously is required to do more than "acquiesce[] in the government's access to evidence." The crucial point in such a case, as in this one, is that the suspect is not required to make a *testimonial* communication.¹¹ Here, petitioner is in fact asked to do no more than lift an impediment to the production of records by a third party.¹²

2. Evidently recognizing that there must be some sort of assertion on his part before the privilege may be invoked, petitioner contends that the consent form is "testimonial" because it contains the implied factual representa-

¹¹ Petitioner suggests that the Fifth Amendment privilege comes into play whenever the suspect's compelled act has "evidentiary" significance (Br. 27-29). As the *Schmerber* line of cases indicates, this statement is not literally correct. We do agree that the privilege may be asserted whenever the compelled act has *testimonial* significance. Petitioner's citation (Br. 28-29) of *In re Katz*, 623 F.2d 122 (2d Cir. 1980), however, does not establish such significance in this case. That decision held that the Fifth Amendment privilege might apply to the production of incriminating documents by a suspect's attorney. Here, of course, there is no attorney-client relationship between petitioner and the banks that hold his accounts.

¹² Similarly, petitioner's suggestion that the "stand aside" rationale could be extended to require the suspect to state the location of records is entirely without merit; any such attempt would improperly force the suspect to disclose knowledge that would assist the government's investigation.

tion that he has consented to the disclosure of hypothetical bank records (Br. 8-9). He then makes a brief attempt to argue that this assertion (and thus the form) might have evidentiary significance. Quoting from the majority opinion in *Ranauro*, petitioner offers (Br. 29-30 (quoting 814 F.2d at 793)) the following hypothetical case:

Suppose that at trial the government were to introduce bank records produced in response to a subpoena that had been accompanied by the consent form and that it was not apparent from the face of the records or otherwise how [the signator] was linked to them. Suppose also that the government then introduced the subpoena and the consent form, and a government witness testified that the bank records were received in response to the subpoena and consent form. Would not the evidence linking [the signator] to the records be his own testimonial admission of consent? We believe it would.

This analysis is seriously flawed. At the outset, the form cannot be said to make a testimonial assertion about the "fact" of petitioner's consent. As we explain above, petitioner is required to perform an act, not to make an assertion, when he places his signature on the form. The government wants to use the signature on the form for its legal significance, just as it uses compelled handwriting exemplars for their "identifying physical characteristic[s]" (*Gilbert*, 388 U.S. at 267). In neither case is the suspect's action compelled for its "content" (*ibid.*) or to obtain "any knowledge [the suspect] might have" (*Wade*, 388 U.S. at 222). In arguing to the contrary, petitioner appears to contend that the performance of every compelled act carries with it an implied assertion that the act has been performed by the person who was the object of the compulsion, which in turn makes performance of the act subject to the privilege. But the Court rejected this circular approach to the Fifth Amendment in *Wade*, *Gilbert*, and

United States v. Dionisio, supra, when it held that there is nothing testimonial in the production of a handwriting or voice exemplar. Of course, it could be said in those cases (as it can in this one) that the suspect, by placing his handwriting or voice sample on the exemplar (or his signature on the consent form), implicitly "acknowledged" that the writing or voice sample (or signature) was his. But as the holdings of those cases make clear, this sort of simple acknowledgement that the suspect in fact carried out the act that he was directed to perform is not "sufficiently testimonial for purposes of the privilege" (*Fisher*, 425 U.S. at 411).¹³

This analysis demonstrates that the central conclusion of the *Ranauro* majority—that evidence provided by a consent form would be a "testimonial admission" within the meaning of the Fifth Amendment—is incorrect. Dissenting in *Ranauro*, Judge Breyer explained (814 F.2d at 797-798) that, even if the majority's "farfetched scenario" came to pass and a consent form were admitted into evidence,

the Fifth Amendment privilege [would] not apply, because the inference that the records belong to [the signator] would not depend upon the jury's belief in the truth of [the signator's] 'assertion' of consent. Rather, the inference would depend upon the non-assertive fact that [the signator] placed his signature at the bottom of the consent form. Whether [the signator] did so voluntarily or involuntarily, while wishing to release the documents or not wishing to

¹³ Certainly, many acts do carry with them implicit testimonial assertions. When a suspect surrenders subpoenaed documents, for example, his act of production may effectively concede that the requested papers exist and that he controls them, and may serve to authenticate them. See *Doe*, 465 U.S. at 613. But these concessions do far more than simply acknowledge that it is the suspect who has performed the compelled act.

release them, while thinking that he really was consenting or not, is all no more relevant than whether a suspect believes the truth of the words he speaks for purposes of voice identification.

As Judge Breyer recognized, and as the Court has repeatedly held, there is no constitutional problem in requiring a suspect to take actions that will link him to the crime, so long as those actions are not testimonial; a suspect may, for example, be compelled to furnish a handwriting exemplar that will tie him to incriminating evidence already in the government's possession. Requiring petitioner to place his signature on the consent form at issue here does not compel a testimonial act—an act that involves an assertion on petitioner's part—any more than does requiring a suspect to provide such an exemplar, or to repeat the words spoken by the perpetrators in a bank robbery. It is the simple fact of petitioner's signature on the form, like the simple fact of a suspect's handwriting on an exemplar, that (if anything) is relevant here. As a result, in the unlikely event that a consent form found its way into evidence and was perceived to link petitioner to records produced by a bank, its use would not violate the Fifth Amendment.

Even if the consent form were understood to carry with it a testimonial assertion of the "fact" of petitioner's consent, petitioner's concern that the form could be used against him at trial is without substance: the form "would have only minimal testimonial value and would not operate to incriminate" him (*Doe*, 465 U.S. at 613). The *Ranauro* court was incorrect in assuming that the form has evidentiary value. As we explain above, the form contains no statement by petitioner about the existence of any accounts or the authenticity of any account records. Any representations about the records and their relationship to petitioner must be made by the bank, and the fact that the bank's customer has consented to the disclosure of his

records would say nothing about the correctness of the bank's representations. For that reason, two courts of appeals have held that consent forms such as the one here are inadmissible at trial because they lack probative value. *Ghidoni*, 732 F.2d at 818; *In re Grand Jury Subpoena*, 826 F.2d at 1171.

By the same token, it is clear that the premise of the *Ranauro* court's hypothetical case—that "it was not apparent from the face of the records or otherwise how [the signator] was linked to them"—will never arise. Before bank records are admitted into evidence, bank officials will have to testify (or the government will have to offer equivalent evidence, see Fed. R. Evid. 901) to authenticate them and link them to the customer. Once that evidence is provided by the bank, a customer consent form such as the one in this case (even assuming that such a form had sufficient evidentiary significance to be relevant) would add nothing; the "existence and location of the [accounts would be] a foregone conclusion and the [consent form would] add[] little or nothing to the sum total of the Government's information." *Fisher*, 425 U.S. at 411. If a consent form somehow were admitted into evidence alongside the testimony of a bank official, it thus would have such minimal probative value that it could not "pose[] any realistic threat of incrimination to the [signator]" (*id.* at 412).¹³ See generally *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980); *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (citation omitted) ("The central standard for the privilege's application has been

¹³ As Judge Newman has explained, even if a consent form could be admitted as evidence at trial, "evidence from the bank, which would be necessary to authenticate the [bank] records, would likely furnish such clear proof that the account is that of the witness, that evidence of his consent to disclosure arguably [would] not expose him to any 'realistic threat of incrimination.'" *In re Grand Jury Subpoena*, 826 F.2d at 1175 n.5 (Newman, J., concurring) (quoting *Fisher*, 425 U.S. at 412).

whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."); *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972) (same).¹⁴

CONCLUSION

The decision of the court of appeals should be affirmed.
Respectfully submitted.

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¹⁴ Petitioner points (Br. 31-32) to the district court's conclusion (see Pet. App. 12a-14a) that the consent form might provide a "necessary link" connecting him to certain accounts. As we explain above, however, this conclusion is incorrect as a matter of law: the link between petitioner and the accounts must be provided by the bank that produces the records. The district court also believed that the government might have difficulty obtaining authentication testimony from bank officials and that "conceivably the government could authenticate the records by introducing the signed consent, and by providing testimony of the government agent who received the records pursuant to the consent" (*id.* at 13a n.7). As we note above, however, the form does not express petitioner's view that any records produced by the banks are authentic, and *Fisher* makes clear that any statement to that effect by petitioner would not, in any event, establish that the records are genuine. Authentication evidence would have to be provided by bank officials.

REPLY BRIEF

(10)
No. 86-1753

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JOHN DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The question in this case is whether the lower court's order requiring John Doe, a grand jury target, to sign a written consent to disclosure of foreign bank records violates his Fifth Amendment privilege against self-incrimination. The parties agree that the Fifth Amendment comes into play whenever an act or statement is compelled, incriminating and testimonial. The parties also agree that Doe's statement would be "compelled" and "incriminating," since Doe has been held in contempt for refusing to sign the document and since the government frankly admits that it wants to use the executed form to "assist [it] in obtaining

incriminating information" from foreign banks (U.S. Br. 7). The sole point of disagreement concerns the meaning of the Fifth Amendment's requirement that the compelled statement be "testimonial."

We contend that a compelled statement is testimonial if the government could use the communicative content of the speech or writing, as opposed to its physical characteristics, to further a criminal investigation. Under our view, the consent form is testimonial because it is a declarative statement made by Doe to the banks, a statement that the government will use to persuade the banks to produce records that would otherwise be unavailable to the grand jury. The government responds that a compelled statement is not testimonial unless it "relate[s] a factual assertion" or otherwise discloses information about an offense being investigated (U.S. Br. 8). Under the government's view, the hypothetical and imperative statements in the document Doe is being compelled to sign do not implicate the Fifth Amendment because they do not disclose facts about any offense.

As thus framed by the parties, the question falls between two well-established categories of Fifth Amendment precedent. On the one hand, the Court has made it clear that, absent a grant of immunity, a witness cannot be forced to admit or disclose any information that might constitute or lead to incriminating evidence. See *Kastigar v. United States*, 406 U.S. 441 (1972); *Fisher v. United States*, 425 U.S. 391 (1976); *United States v. Doe*, 465 U.S. 605 (1984). On the other hand, a long line of cases establishes that a witness can be forced to assist the prosecution by producing physical evidence, such as a handwriting or voice exemplar, so long as the required conduct

involves no "testimonial compulsion upon or enforced communication by the accused." *Schmerber v. California*, 384 U.S. 757, 765 (1966); see *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Dionisio*, 410 U.S. 1 (1973).

The instant litigation is not controlled by either category of precedent. Unlike the physical evidence cases, this case involves an enforced communication by Doe. And, unlike the cases involving evidentiary disclosures, this case involves a communication that the government has carefully drafted to avoid factual assertions relevant to the alleged offenses being investigated. Thus, the Court must decide which rule applies to compelled communications that fall in the gap between physical evidence and evidentiary disclosures.

As is discussed in our opening brief (at 8-16), the policies that this Court has identified as underlying the privilege against self-incrimination support our position that the Fifth Amendment applies to any compelled communication that is sought for its content, as opposed to its physical characteristics. The declaration and statement of intention contained in the consent form purport to communicate Doe's private thoughts to the bank. By signing the form, Doe would "disclose the contents of his own mind" (*Curcio v. United States*, 354 U.S. 118, 128 (1957)) just as surely as he would by signing a confession. By ordering Doe to sign the consent, the courts below have denied him the right, as a criminal accused, "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (citation omitted).

1. If this Court were to adopt the government's proposed distinction between factual assertions and other communications, it would create an exception to the bright-line rule of *Miranda*. For the first time, law enforcement officials would be authorized to make an unwilling suspect speak. They could force a suspect to assist them in their investigation by issuing directives to known accomplices, by telling lies designed to deceive other suspects, or by waiving rights and privileges that block the government's access to incriminating evidence. Indeed, under the government's view, law enforcement officials could coerce a suspect to make any sort of statement that did not directly disclose information about the offense.

To illustrate the revolutionary implications of the government's proposed rule, consider an investigation of an alleged conspiracy. Under the prevailing view of the Fifth Amendment, a prosecutor must offer a suspect use immunity or reach a plea bargain with him in order to enlist his cooperation against other participants. If the Court were to adopt the government's view of the privilege, the prosecutor could simply compel the first person arrested to call other potential targets and make deceptive statements calculated to cause them to incriminate both him and themselves. So long as the prosecutor identified the people to be called and the statements did not disclose any relevant facts, there would, under the government's view, be no Fifth Amendment violation.

Other uses of this new-found authority would be limited only by the imagination of law enforcement authorities. The police could make a robbery suspect write a note to a known accomplice advising him to confess. They could make an unwilling witness call a

suspected drug dealer and pretend to offer to buy drugs, or call a suspected bookmaker and pretend to place a bet. So long as the witness simply spoke the words provided to him by the police, his statements would be "nontestimonial" and, hence, unprotected by the Fifth Amendment.

By even closer analogy to this case, the police could make an accused sign a consent directive designed to overcome any right or privilege that the government deems a "nonconstitutional impediment" (U.S. Br. 17) to the production of evidence by a third party. A suspect, for example, could be made to waive the priest-penitent or physician-patient privilege so that the police could question his minister or doctor. A defendant could be made to waive the marital privilege so that his wife could appear as a prosecution witness. Or a grand jury target could be made to authorize his attorney to appear before the grand jury and testify about confidential communications.¹

The government may respond that these examples have not arisen in practice and that the Court should not assume that the police will abuse their authority to compel communications. But the reason why these examples have not previously arisen is that, until the government defended the "compelled consent" procedure on the basis of a supposed dichotomy between factual assertions and other communications, it would have never occurred to any responsible law enforce-

¹ To be sure, the prosecution would face an uphill struggle in any subsequent suppression hearing to establish that the compelled consent directive was a valid waiver of the privilege at issue. But, in the government's view, the police would be free to obtain the directive at the outset, leaving the accused at risk that the third party would fail to assert an objection based on voluntariness or that the waiver would ultimately be sustained.

ment officer that he could, consistent with the Fifth Amendment, force an unwilling suspect to waive a privilege or to cooperate in an investigation by communicating with third parties. Therefore, it is reasonable to assume that adoption of the government's proposed rule would lead to potentially abusive investigative techniques, confusion about the subtle distinctions between "testimony" and "nonassertive communications," and an added burden on the courts to control abuse and draw the boundaries of the redefined privilege.

2. The government does not cite a single case in which this Court has held that a compelled verbal communication was outside the Fifth Amendment privilege because it did not convey information about an offense. The government's reliance on *Fisher* and *Doe* is misplaced, because those cases did not involve verbal communications, but acts of producing records that carried with them implied admission of potentially evidentiary facts—that the records existed, were in the witness's possession, and were authentic. The Court had no occasion in *Fisher* or *Doe* to address the Fifth Amendment implications of compelled verbal communications that do not disclose evidentiary facts.

The government also errs in relying on the physical evidence cases like *Schmerber*, *Gilbert*, and *Dionisio* for the proposition that "the Fifth Amendment privilege may be asserted only when [an accused] is being asked to disclose knowledge that could incriminate him." (U.S. Br. 8). Those cases did not involve communications, and so their holdings cannot be read as dictating the Fifth Amendment consequences here. Indeed, the Court's analysis of the issue actually presented in the physical evidence cases—whether an ac-

cused can be compelled to assist the government in obtaining evidence through noncommunicative conduct—supports our position that the Fifth Amendment is implicated whenever the accused is compelled to make any form of statement that will be used for its content. For example, the Court stated in *Schmerber* that the privilege against self-incrimination "is a bar against compelling 'communications' or 'testimony'" (384 U.S. at 764) and held that neither communication nor testimony is involved when a defendant is required to furnish a blood sample. As is discussed in our opening brief (at 11-13), this Court's holding in each of the other physical evidence cases was likewise predicated on a determination that the conduct being compelled did not involve any form of communication.²

Other cases cited by the government (U.S. Br. 8, 10-11) are even farther afield from this case, and their holdings are altogether consistent with our view of the Fifth Amendment. In *Couch v. United States*, 409 U.S. 322 (1973), the Court held that compelled pro-

² In light of the government's insistence that compelled communication is not necessarily "testimonial" for Fifth Amendment purposes, it is worth reiterating that, in the first physical evidence case, Justice Holmes defined the privilege against self-incrimination as "a prohibition of the use of . . . compulsion to extort communications from [the accused]." *Holt v. United States*, 218 U.S. 245, 252-53 (1910). In analyzing the Fifth Amendment issue in subsequent physical evidence cases, the Court has likewise contrasted noncommunicative conduct, which is not protected by the Fifth Amendment, with compelled testimony or communications, which are protected. See *Schmerber*, 384 U.S. at 765 (extraction of blood involves no "testimonial compulsion upon or enforced communication by the accused") (emphasis added); *Dionisio*, 410 U.S. at 7 (voice exemplar was sought for its physical characteristics, "not for the testimonial or communicative content of what was to be said") (emphasis added) (footnote omitted).

duction of records by a person's accountant did not constitute self-incrimination; in so holding, the Court emphasized that "there was no enforced communication of any kind from any accused or potential accused" (409 U.S. at 331). Similarly, the Court held in *Andresen v. Maryland*, 427 U.S. 463 (1976), that the Fifth Amendment did not prevent the government from obtaining records in a search, since the owner of the records "was never required to say or to do anything under penalty of sanction" (427 U.S. at 476). The Court made clear that the Fifth Amendment bars the coercion of "communication, whether oral or written," and it stated that the key question is "whether the accused was compelled to speak." *Id.* at 475. Indeed, the Court stated (*id.* at 474) that a crucial determinant of the Fifth Amendment's coverage is whether an accused is being "required to aid in the discovery . . . of incriminating evidence"—precisely the situation here. Nothing in *Andresen* or *Couch* suggests that the privilege is unavailable when the accused is compelled to make a nonevidentiary statement that will be used for its content.

The only authority cited by the government that is even remotely on point is Wigmore, who stated in his treatise on evidence that the Fifth Amendment privilege "was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence." 8 J. Wigmore, *Evidence* § 2263 at 378 (McNaughton rev. ed. 1961) (emphasis in original), cited in U.S. Br. at 10. This Court referred to Wigmore's formulation of the privilege in *Schmerber*, but it explicitly declined to adopt that formulation as a basis for determining what conduct is or is not pro-

tected by the Fifth Amendment. See 384 U.S. at 763 n.7.³

Finally, the government blatantly mischaracterizes *Estelle v. Smith*, 451 U.S. 454 (1981), as a run-of-the-mill Fifth Amendment case involving "the use at the defendant's trial of statements improperly elicited from the defendant by a state psychiatrist." (U.S. Br. 14). While it is true that the defendant in *Estelle* was compelled to speak to a psychiatrist in a court-ordered pretrial competency examination, the Fifth Amendment violation was the introduction into evidence of the psychiatrist's diagnosis, not the defendant's statements. The psychiatrist was not asked about, and did not disclose on direct examination, the substance of any statement made by the defendant.⁴ See Joint Appendix of the parties filed in *Estelle v. Smith*, 451 U.S. 454 (1981) (No. 79-1127) at 17-26 ("*Estelle*, App."). By the time the psychiatrist was called to testify, the defendant had already been convicted and his confession was in the record (*id.* at 39), so that any information that the psychiatrist learned from the defendant could not have been material or prejudicial. Thus, while this case and *Es-*

³ It is not even clear that Wigmore's formulation of the privilege, read in context, actually supports the government's position. The discussion relied upon by the government relates to the question whether the privilege applies to incriminating disclosures that do not involve communication, such as a handwriting exemplar, or whether it is limited to "disclosures which are testimonial (i.e., communicative or assertive) in nature." 8 J. Wigmore, *supra*, at 378 (emphasis in original). Thus, even Wigmore appears to equate testimonial conduct with communicative conduct, regardless of the substance of the communication.

⁴ On cross examination, the defendant's attorney asked the psychiatrist about the defendant's statements, but in so doing he clearly waived any Fifth Amendment objection to the admission of those statements in evidence. See *Estelle*, App. at 27-29.

telle arose in different factual settings, *Estelle* presents an issue analogous to that raised by the compelled consent here: Can the government force an accused to communicate with a third party in order to obtain incriminating evidence from the third party? By answering that question in the negative, the Court in *Estelle* went beyond the government's narrow view of the privilege as a prohibition against compelling the accused to disclose relevant information.

3. Tacitly acknowledging that there is no authority for its argument that testimonial communications must disclose facts about an offense, the government contends in the alternative that the consent directive is not a communication at all (U.S. Br. 15-16). It concedes that Doe is being compelled to sign a "verbal statement" (*id.* at 13), but it suggests that a statement is not a "communication" if it merely "directs the recipient . . . to do something" (*id.* at 15). In such a case, the government says, the "direction" is a mere "'verbal act'" (*ibid.*, quoting *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791, 798 (1st Cir. 1987) (Breyer, J., dissenting)). All this is the sheerest sophistry. The terms "direction" and "verbal act" are synonyms for "communication." Semantic distinctions cannot change the substance of the compelled consent procedure, under which the content of a coerced statement is used to obtain incriminating evidence that would otherwise be unavailable to the government.⁵

⁵ The government notes (U.S. Br. 15 n.8) that the courts have excluded instructions and imperative statements from the definition of hearsay on the ground that such "verbal acts" are not offered to prove the truth of the matter asserted. But the fact that "verbal acts" are not hearsay has no bearing on whether such statements are "com-

In both form and substance, the consent directive is indisputably a communication. It is addressed to "any bank or trust company" and purports to state (a) that Doe authorizes and directs the bank to disclose confidential information to the grand jury; (b) that the authorization is irrevocable; and (c) that Doe intends his statements to constitute consent for purposes of Cayman bank secrecy laws and Bermuda common law.⁶ The government wants Doe to sign the consent so that it can present these three statements to the bank as declarations of Doe. If the government genuinely wanted Doe to sign the consent for some reason other than the adoption of its content, then the government presumably would not object if Doe appended a disclaimer to the form before signing it. But such disclaimer would obviously be unacceptable to the government, because the consent cannot serve its intended purpose unless the bank believes it to be a communication of Doe's own thoughts.⁷

The government's argument that Doe's consent "is sought only for its legal effect" (U.S. Br. 15) is similarly unpersuasive. The effect sought by the government is satisfaction of a foreign-law requirement that the customer communicate to the bank his consent to disclosure of confidential information. If the govern-

communications" for purposes of the Fifth Amendment. Surely the government does not contend that the police can force an accused to utter any statement that would be admissible under Fed. R. Evid. 801(c).

⁶ The text of the consent directive is reproduced at Pet. Br. 3-4 n.2.

⁷ In *In re N.D.N.Y. Grand Jury*, 811 F.2d 114 (2d Cir. 1987), a grand jury target who was ordered to sign a consent directive wrote the words "Executed under protest" above his signature. The government objected and moved for contempt sanctions on the ground that the disclaimer "might affect the validity of the 'Consent Directive' in the eyes of foreign financial institutions." *Id.* at 116.

ment were seeking only a legal result, not a compelled communication, it could avoid any Fifth Amendment objection by obtaining a court order stating that Doe is deemed to have waived all foreign confidentiality laws. But such an order would be ineffective because it is Doe, not the government or the court, who must communicate his consent to the bank.

In arguing that the consent form "is sought only for its legal effect," the government contends that the content of the document is irrelevant. Because it is signed under compulsion, the government argues, "the form sheds no light on petitioner's actual intent or state of mind" (U.S. Br. 15). We agree. But that observation only serves to highlight a serious inconsistency in the government's position. It is true that the consent form does not reflect Doe's genuine private thoughts: he does not want to authorize any bank to disclose records of his account; he does not want his authorization to be irrevocable; and he believes that his coerced consent is invalid for purposes of Cayman and Bermuda law. Were the consent form to reflect Doe's true thoughts, it would end: "The above statements are not mine; they reflect the intentions and beliefs of the United States government official who drafted this document."

Surely the government cannot profit from the fact that the compelled consent procedure forces Doe to adopt statements he does not believe so that the government can use them to obtain a desired legal effect. The government wishes the bank to regard the consent form as a communication from Doe and to rely upon its content as his authorization to produce confidential records. At the same time, for Fifth Amendment purposes, the government wishes this Court to

regard Doe's execution of the consent form as an act devoid of content. The government simply cannot have it both ways. Having chosen to dress the procedure up as a communication of the contents of Doe's mind, the government must accept the Fifth Amendment consequences.

4. The government argues that the Fifth Amendment does not come into play because Doe's signature on the consent "simply removes a nonconstitutional impediment imposed by foreign law on the production of third party documents" (U.S. Br. 17). This is no more than a rephrasing of the proposition that the lower court's order merely requires Doe to "stand aside" and permit the banks to honor the grand jury subpoenas—a proposition to which we responded in our opening brief (at 21-23). The relevant point is not whether the consent would facilitate the government's access to records, but how it would do so, and here it would do so by forcing Doe to speak. The fact that the end sought by the government is access to third-party documents does not eliminate the Fifth Amendment problem with the means it has chosen. As we pointed out in our opening brief, the "stand aside" rationale is inconsistent with this Court's holding in *Curcio v. United States*, 354 U.S. 118 (1957), that a custodian of corporate records cannot be compelled to facilitate the government's access to third-party records by identifying the custodian or stating the location of corporate records that are not in his custody or control, regardless of whether his knowledge of the location of the records might be incriminating. While reiterating the "stand aside" argument in its brief, the government offers no response to our citation of *Curcio*.

5. In our opening brief we argued in the alternative (Pet. Br. 26-32) that the executed consent form would be testimonial self-incrimination because it could be introduced in evidence at a trial to establish a link between Doe and the records produced by the bank. That was the analysis on which the First Circuit relied when it held the compelled consent procedure unconstitutional in *In re Grand Jury Proceedings (Ransauero)*, 814 F.2d 791 (1st Cir. 1987).

The government's response to the *Ransauero* analysis (U.S. Br. 18-23) proves rather than refutes our point. The government first argues that, even if the consent were admitted into evidence, no testimonial self-incrimination would result because signing the form is a "verbal act," not a communication. See U.S. Br. 18-21. As we explain above, however, the consent form is "testimonial," no matter how it is labelled, because it contains affirmative representations of fact that the government wants Doe to adopt as his own.

The government next argues that, even if the consent form is testimonial, the circumstances described in *Ransauero* "will never arise" (U.S. Br. 22). This argument is based on the proposition that the bank records would be admitted into evidence only after being linked to Doe by the testimony of the bank officer who authenticated them. In such circumstances, the government says, introduction of the consent "would add nothing" (*ibid.*). But, as the district court noted below (App. 13a n.7), it is by no means certain that a foreign bank official would be willing to appear and testify in violation of his nation's bank secrecy laws. If no bank officer testifies, the government concedes that it would use other "equivalent evidence" to authenticate the bank records and link them to

Doe. (U.S. Br. 22, citing Fed. R. Evid. 901). Having declined to apply for use immunity, the government does not, and cannot, offer any assurance that the consent form will not be a part of that "other evidence."

In the end, the government is forced to argue that, even if the consent form were introduced into evidence to prove Doe's link to foreign bank records, the form would not be incriminating because it would have "minimal probative value." U.S. Br. 22. But that is an issue of fact for the trial court, and the trial court in this case resolved it in petitioner's favor. See Pet. Br. 31-32; App. 12a-13a, 14a.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

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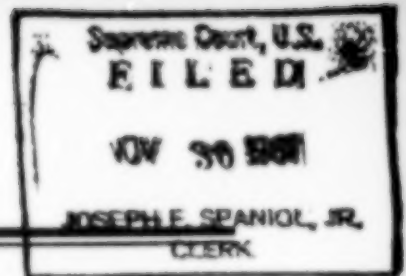
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February 1988

AMICUS CURIAE

BRIEF

No. 86-1753



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JOHN DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF THE GOVERNMENT OF THE
CAYMAN ISLANDS AS *AMICUS CURIAE*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

 No. 86-1753

JOHN DOE,
 v. *Petitioner,*

UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari to the United States
 Court of Appeals for the Fifth Circuit**

**BRIEF OF THE GOVERNMENT OF THE
 CAYMAN ISLANDS AS *AMICUS CURIAE***

INTEREST OF *AMICUS CURIAE*

The Government of the Cayman Islands submits this brief as *amicus curiae* under Rule 36 of the Rules of this Court¹ for the limited purpose of bringing to the Court's attention the serious issues of international comity and conflict of laws between sovereign nations that arise from a United States court order compelling a person to authorize foreign banks to disclose records of his or her accounts. It is of great importance to the Governments of

¹ Pursuant to Rule 36, the parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

the United Kingdom and of the Cayman Islands that this Court refrain from deciding or commenting upon those issues until the Court has before it an appropriate case with an adequate record upon which to render a reasoned decision. *Amicus* therefore submits this brief to assist this Court in reaching an informed and appropriately limited resolution of this case.

The Government of the United Kingdom has a particular interest in this case because the case concerns two British dependent territories, Bermuda and the Cayman Islands. In addition, the Government of the United Kingdom, on behalf of and in conjunction with the Government of the Cayman Islands, recently negotiated a Mutual Legal Assistance Treaty with the United States with respect to criminal matters. This Treaty has a bearing on the issues raised in this case.

As the sovereign power, the United Kingdom retains responsibility for the external relations of the Cayman Islands. The United Kingdom has an interest in protecting its sovereignty in the Cayman Islands (and in other United Kingdom dependent territories, including Bermuda). The Government of the United Kingdom accordingly has authorized the Government of the Cayman Islands to make the above references to it and to state that if there were an attempt to compel production or disclosure of documents located in the Cayman Islands in violation of, or in a manner inconsistent with, the law of the Cayman Islands or the sovereignty of the United Kingdom, or if the Court were to decide at a subsequent stage to consider the broader issues of international law or comity potentially raised by this case, the Government of the United Kingdom would wish to take whatever steps may be open to it to place its views on those issues before the Court.

The Cayman Islands are located in the Caribbean Sea, approximately 460 miles southwest of Miami, Florida. Discovered by Christopher Columbus in 1503, the

Cayman Islands are one of the oldest of the British Crown Colonies. The Cayman legal system follows English common law in all cases unless superseded by a specific local statute.

The economy of the Cayman Islands has traditionally encouraged free enterprise and fostered the growth of financial and trading institutions. With over 500 banks, the Cayman Islands have emerged as a significant world banking center. As part of this development, a significant number of insurance companies, accounting firms, attorneys and financial management companies have become established in the Cayman Islands. The Government of the Cayman Islands derives a significant portion of its revenues from the registration and license fees paid by companies incorporated in the Cayman Islands.

Among the many factors that account for the success of the Cayman economy is the fact that the Government of the Cayman Islands has never imposed income taxes of any kind, nor any other type of corporate or individual tax.² Furthermore, businesses and investors have long been attracted to the Cayman Islands because of their political, social and economic stability and because of the existence of strict confidentiality laws.

One of these confidentiality laws, the Confidential Relationships (Preservation) Law (Law No. 16 of 1976), as amended (Law No. 26 of 1979), is involved in the present case. An outgrowth of English common law, the Law makes it a criminal offense for a Cayman bank to divulge to others any confidential information with respect to a customer's account unless the customer has consented to

² "[T]he absence of income tax is not an artificial factor created by legislation but rather a natural one in that the Islands have been able to develop without income taxation." 2 W. Diamond & D. Diamond, *Tax Havens of the World* 1 (Cayman Islands) (1986).

the disclosure.³ In the present case, petitioner Doe has been ordered by a United States district court to sign a form purporting to consent to the disclosure of records pertaining to his accounts with any Cayman bank.⁴

INTRODUCTION AND SUMMARY OF ARGUMENT

The sole question before this Court is whether a compelled signature on a form authorizing release of confidential information held by a foreign bank violates petitioner's Fifth Amendment privilege against self-incrimination. It is this narrow issue that has resulted in a split among the courts of appeals and that petitioner has presented for review by this Court.

Amicus takes no position with respect to the specific Fifth Amendment issue before the Court. However, because the parties are likely to analyze the issue presented in this case solely as a matter of United States domestic law, it is important that the Court be advised of the broader implications of any decision involving the issue

³ The Law specifically provides:

Subject to the provisions of sub-section (2) of section 3, whoever—(a) being in possession of confidential information, however obtained

(i) divulges it; or

(ii) attempts, offers or threatens to divulge it . . .

is guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 2 years or both.

Confidential Relationships (Preservation) Law (Law No. 16 of 1976), as amended (Law No. 26 of 1979) § 4. The Law enumerates several narrow exceptions, including the "divulging . . . of confidential information . . . by or to—(i) any professional person acting . . . with the consent, express or implied, of the relevant principal." *Id.* § 3(2) (emphasis supplied). "Professional person" is defined to include a bank. *Id.* § 2.

⁴ The United States also seeks compelled consent to the disclosure of records pertaining to petitioner's accounts with any Bermuda bank.

of "compelled consent."⁵ Specifically, certain statements made by both petitioner and the United States in support of the petition for a writ of certiorari give rise to the concern of *amicus* that other issues of vital importance to the Cayman Islands may inadvertently be affected or even decided in the course of these proceedings without the benefit of any briefing or a complete record.

First, the Solicitor General describes compelled consent as "one of the most effective means of penetrating bank secrecy," *Memorandum of the United States* at 4-5, and petitioner states that a Cayman bank "will produce records of [his] account upon receipt of Doe's authorization," *Petition for Certiorari* at 8. In fact, a compelled consent is neither sufficient nor necessary to obtain confidential financial records protected by the laws of the Cayman Islands. Compelled consent is insufficient because the Grand Court of the Cayman Islands expressly has held that such compelled "consent" is not a valid consent under the provisions of the Cayman confidentiality law.⁶ See pp. 9-11, *infra*. Thus, Cayman banks presented with such a compelled consent remain subject to criminal prosecution in the Cayman Islands if they disclose their customers' records to others.

Nor is a compelled consent a necessary means of obtaining confidential information held by a Cayman bank. Other means have been made available to the United

⁵ Both petitioner and respondent use the term "compelled consent," while courts in other cases have used such terms as "compelled waiver" and "consent directive," to describe the same type of court-ordered authorization of disclosure of foreign bank records. See, e.g., *United States v. Davis*, 767 F.2d 1025, 1033-36 (2d Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814, 816 (11th Cir.), cert. denied, 469 U.S. 932 (1984); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789, 799 (S.D.N.Y. 1984). *Amicus* considers these terms to be interchangeable.

⁶ *In re An Application by ABC, Ltd. Under the Confidential Relationships (Preservation) (Amendment) Law, 1979*, 1984 C.I.L.R. 130 (1984).

States by *amicus* Government of the Cayman Islands in a series of agreements since 1982. Most recently, on July 3, 1986, the United States and the United Kingdom entered into a treaty providing for mutual legal assistance between the United States and the Cayman Islands in criminal matters. On August 4, 1987, this treaty—entitled “A Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters” (Treaty Document No. 100-8)—was transmitted from the President to the Senate, where it now awaits ratification. Upon ratification, the Treaty will supersede an October 5, 1982 informal letter agreement concerning U.S.-Cayman cooperation in most criminal matters.⁷ In addition, there remains in effect a 1984 letter agreement between the United States and the United Kingdom, acting on behalf of the Cayman Islands, pursuant to which the Cayman Islands have agreed to render assistance on a case-by-case basis to the United States in facilitating the disclosure of confidential financial records relating to illegal narcotics transactions.⁸ Thus, reliance upon compelled consent cannot be justified as necessary to obtain bank records.

Furthermore, the Solicitor General, citing a United States Senate subcommittee report, decries the use of foreign banks “to systematically obstruct U.S. law enforcement investigations.” *Memorandum of the United*

⁷ Letter of D.H. Foster, Acting Governor of the Cayman Islands, to Michael Carpenter, Esq., Consul General, United States Embassy, Kingston, Jamaica (Oct. 5, 1982).

⁸ See Exchange of Letters Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning the Cayman Islands and Matters Connected With, Arising From, Related To, or Resulting From Any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol Amending the Single Convention on Narcotic Drugs (1961), July 26, 1984.

States at 4. The Solicitor General asserts that “[p]ersons engaged in criminal activity have made increasing use of accounts in nations with strict bank secrecy laws to hide funds from law enforcement agencies.” *Id.* Contrary to the suggestion implicit in the Solicitor General’s submission, the Cayman Islands’ confidentiality laws are designed to serve legitimate interests, which this Court should not ignore. See pp. 11-12, *infra*.

The Governments of the United Kingdom and of the Cayman Islands actively oppose the use of Cayman confidentiality laws to shield criminal conduct or the proceeds thereof, and they have assisted United States law enforcement efforts through diplomatic channels. However, while they actively oppose improper use of their confidentiality laws, such laws are vital to attracting and promoting legitimate business activities and to maintaining the Cayman Islands’ stature as a major world financial center.

In sum, there is a fundamental conflict between the Solicitor General and the Cayman courts concerning the interpretation of “consent” and the effect of compelled “consent” on the production of Cayman bank records. In addition, there is a basic disagreement about the necessity of compelled consent as a method of furthering the law enforcement interests of the United States. In light of the significant interests of *amicus* embodied in its domestic laws and diplomatic activities with the United States, it is clear that resolution of the basic conflict between petitioner and the United States can give rise to serious questions of international comity and potential conflicts between the laws of sovereign nations. Accordingly, it is important in deciding this case that the Court recognize that these issues exist, and it is equally important that the Court not decide or even discuss those issues in this case.

ARGUMENT

IN DECIDING THE FIFTH AMENDMENT ISSUE POSED BY PETITIONER, THE COURT SHOULD REFRAIN FROM ADDRESSING THE ISSUE OF WHETHER A COURT ORDER COMPELLING A PERSON TO AUTHORIZE FOREIGN BANKS TO DISCLOSE HIS BANK RECORDS IS CONSISTENT WITH PRINCIPLES OF INTERNATIONAL COMITY.

A. The Use of a-Compelled Consent with Respect to Bank Records in the Cayman Islands Raises Significant Questions of International Comity.

As this Court recently observed, "[c]omity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 107 S. Ct. 2542, 2555 n.27 (1987). Comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens. . . ." *Id.* (citing *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)).

Continued attempts by United States law enforcement officials to obtain court-compelled consent to disclosure of Cayman bank records strain diplomatic relations between the United States and *amicus* and consitute a potential source of friction between them.⁹ Such attempts—and

⁹ Although it is difficult to know the frequency with which United States law enforcement officials attempt to employ the "compelled consent" tactic, because many attempts may be unreported, the number of recent proceedings in which the "compelled consent" issue has arisen provides some indication of the frequency—and the significance—of these attempts. See, e.g., *In re Grand Jury Subpoena*,

the subsequent attempts to compel Cayman banks to honor "consent directives" or be faced with contempt sanctions by United States courts—conflict with Cayman legal precedent that nullifies the effectiveness of *compelled* consent, and circumvent existing diplomatic channels for Cayman cooperation. Taken as a whole, the efforts of the United States to require extraterritorial recognition of such "consent" raise serious issues concerning international comity.¹⁰

In *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984), the court rejected defendant's Fifth Amendment argument and upheld an order compelling the defendant to sign a directive that would give his "consent" to the disclosure of his Cayman bank records. The Grand Court of the Cayman Islands, however, in response to the request of a bank that wished to "clarify its position" with respect to such consent directives in light of *Ghidoni*, ruled that a consent directive signed pursuant to an order of a United States court and at the risk of penal sanctions, could not constitute "consent" under the Cayman confidentiality law. *In re An Application by ABC, Ltd. under the Confiden-*

826 F.2d 1166 (2d Cir. 1987); *In re Grand Jury Proceeding (Ranauro)*, 814 F.2d 791 (1st Cir. 1987); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); *Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition v. Secord*, Misc. No. 87-0090, slip. op. (D.D.C. April 16, 1987); *United States v. Pedro*, 662 F. Supp. 47 (W.D. Ky. 1987); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789 (S.D.N.Y. 1984); see also *Cecil Coe and Peter Poe v. United States*, No. 87-517, Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, October Term, 1987, 56 U.S.L.W. 3290 (Oct. 20, 1987).

¹⁰ The issuance of subpoenas by the United States to mainland branches of international or Cayman-based banks is an example of the untoward effect that United States law enforcement efforts can have on diplomatic relations. In the proceeding below, subpoenas were issued directly to the United States branches of the two banks in the Cayman Islands and the one bank in Bermuda thought to have bank records relevant to petitioner.

tial Relationships (Preservation) (Amendment) Law, 1979, 1984 C.I.L.R. 130 (1984). In so holding, the Cayman Grand Court stated, "where consent is a material element giving rise to a legal consequence, it must be voluntarily and freely given in the exercise of an independent and uncoerced judgment." *Id.* at 134-35. The Grand Court concluded that a compelled consent, such as the consent directive approved in *Ghidoni*, would therefore not be considered "consent" for purposes of section 3(2)(b)(i) of the Confidential Relationships (Preservation) (Amendment) Law, 1979.

The consent form that petitioner Doe has refused to sign is substantially similar to the form used in the *Ghidoni* case,¹¹ particularly with respect to the statement

¹¹ The consent form proposed by the government in this case states:

I, [John Doe], of the State of Texas in the United States of America, do hereby direct any bank or trust company at which I may have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to said bank account to Grand Jury 84-2, empaneled May 7, 1984 and sitting in the Southern District of Texas, or to any attorney of the United States Department of Justice assisting said Grand Jury, and to give evidence relevant thereto, in the investigation conducted by Grand Jury 84-2 in the Southern District of Texas, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Southern District of Texas issued in connection with the aforesaid investigation, dated ——. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and to any implied contract of confidentiality between Bermuda banks and their customers which may be imposed by Bermuda common law, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

Brief for Appellee Doe at 5-6, No. 85-2373, United States Court of Appeals for the Fifth Circuit, August 2, 1985. Compare *Ghidoni*, 732 F.2d at 815-16.

that the form "is intended to apply to" the Cayman statute and the statement that the form has been executed pursuant to court order. Thus, the consent form that the government wishes petitioner Doe to execute has been shown to be ineffective under Cayman law.

In addition, to the extent that the combination of a compelled consent and the issuance of subpoenas is intended to circumvent the protections afforded by the Cayman confidentiality statute, such acts threaten to undermine a law of great importance to *amicus*. Financial confidentiality laws serve important legitimate purposes.¹² For example, corporations or individuals seek confidentiality for certain legitimate business transactions, which, if known in advance by others, might not succeed or be as profitable. Staff of Senate Committee on Governmental Affairs, 98th Cong., 1st Sess., *Crime And Secrecy: The Use of Offshore Banks and Companies* 44 (Comm. Print 1983). Other legitimate purposes served by financial confidentiality laws include: (1) protection of capital from political, religious and racial

¹² U.S. law enforcement officials recognize that bank secrecy should generally be protected:

It is a mistake . . . to condemn bank secrecy, per se, because it is being abused in some countries and jurisdictions. Persons and businesses transacting business with and through banks are entitled to a reasonable degree of privacy in connection with such business transactions. The United States itself, through the Right to Financial Privacy Act, recognizes this right.

Statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice, *Crime and Secrecy: The Use of Offshore Banks and Companies: Hearings Before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs*, 98th Cong., 1st Sess. 216 (1983). Assistant Attorney General Jensen further stated that "[t]he critical question is not whether a country has bank secrecy laws, but whether the country has built into its laws effective and efficient means of piercing bank secrecy where there is reasonable suspicion that a bank account has been used in connection with a crime or as the depository of the proceeds of a crime." *Id.* (emphasis in original).

persecution; (2) protection from oppressive governments, confiscatory taxes and risks of war; (3) protection from unwanted popularity or threats to one's reputation; (4) protection from legal judgment; and (5) protection from domestic robbery.¹³ Indeed, protection of confidentiality is a time-honored tradition of the common law.¹⁴

Finally, it should be recognized that the Government of the Cayman Islands has taken significant steps to cooperate with United States law enforcement officials to prevent criminals from using Cayman confidentiality laws as a shield. First, in 1982, the Cayman government entered into an informal letter agreement with the United States government providing for cooperation in criminal matters.¹⁵ Then, in 1984, the Cayman Islands were party to an executive agreement with the United States to assist in obtaining Cayman bank records of suspected narcotics traffickers.¹⁶ As the head of the Criminal Division of the Department of Justice recently stated,

Under that agreement, the Cayman Islands agreed to provide, among other things, bank records within two weeks of being presented with a certification from the Attorney General of the United States establishing that the U.S. needed the records in connection with a case involving drug trafficking. We have sent the Caymans approximately 100 requests and have been delighted with the responsiveness and adherence to the terms of the agreement shown by the Caymans.

¹³ Comment, *Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Islands Example*, 20 Tex. Int'l L. J. 133, 134 n.5 (1985).

¹⁴ The Cayman statute, which provides for criminal sanctions, is based upon the common law implied contractual obligation of financial confidentiality, as set forth in *Tournier v. National Provincial & Union Bank of England*, [1924] 1 K.B. 461 (C.A. 1923).

¹⁵ See note 7, *supra*.

¹⁶ See note 8, *supra*.

Statement of William F. Weld, Assistant Attorney General, Criminal Division, Department of Justice, Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance, Committee on Banking, Finance and Urban Affairs, House of Representatives, Concerning Money Laundering at 27-28 (May 6, 1987).

Presently, the existing Mutual Legal Assistance Treaty extends Cayman cooperation in making confidential documents available to United States law enforcement officials with respect to almost all federal and state crimes in the United States.¹⁷ Thus, continued attempts to use compelled consent to obtain documents covered by the Treaty from the Cayman Islands are fundamentally at odds with the significant diplomatic efforts of both governments to resolve this issue amicably and at the governmental level. Moreover, continued attempts of the United States government to use such compelled consents in the Cayman Islands will inevitably lead to serious conflicts of sovereign law and a diminution of the cooperative law enforcement efforts which have characterized relations between the United States and *amicus* in recent years.

B. The Record is Inadequate to Resolve Questions of International Comity, Which Require a Particularized Analysis of the Respective Interests of the United States and the Foreign Nation.

Despite the significant questions as to whether the compelled consent violates recognized principles of international comity and should therefore be disavowed,

¹⁷ See p. 6, *supra*. Guided by the principle of reciprocity, the United States and the United Kingdom have agreed that, with the exception of a number of crimes, such as insider trading and racketeering, which are crimes in the United States but not in the Cayman Islands, the Mutual Legal Assistance Treaty does not extend assistance with respect to an activity that is not recognized as a crime in both jurisdictions, such as income tax evasion, which cannot be a crime in the Cayman Islands because there is no income tax there.

amicus urges this Court to refrain from deciding or commenting upon those questions in this case. The record herein is inadequate to resolve those questions.

As the Court has recognized, the concept of international comity requires a "particularized analysis of the respective interests of the foreign nation and the requesting nation." *Societe Nationale*, 107 S. Ct. at 2555. The nature of the concerns that guide a comity analysis in the present context include: (1) the importance to the litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986); see *Societe Nationale*, 107 S. Ct. at 2555-56 n.28. The record in this proceeding plainly does not address these factors adequately.

In fact, almost no court to date that has considered the validity of the compelled consent, including the courts below, has addressed the basic issue of international comity. See *In re Grand Jury Subpoena*, 826 F.2d 1166 (2d Cir. 1987); *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791 (1st Cir. 1987); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), cert. denied, 469 U.S. 932 (1984); *Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition v. Secord*, Misc. No. 87-0090, slip op. (D.D.C. April 16, 1987); *United States v. Pedro*, 662 F. Supp. 47 (W.D. Ky. 1987); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789 (S.D.N.Y. 1984). Only in *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985), did the court expressly

apply a comity analysis.¹⁸ However, balancing the Cayman interests against the interests of the United States in *Davis* was relatively simple, because in that case the Cayman Attorney General was supporting the bank's efforts to obtain a court order authorizing disclosure of the records.

In light of the inadequacy of the record in this proceeding and the paucity of case law dealing with the basic problem, this Court should do no more than recognize that international comity is a serious issue implicated in this case. The Court should refrain from addressing any of the issues of international comity raised by a court order, or enforcement of such an order, compelling consent to the disclosure of bank records in the Cayman Islands.

C. If the Court Should Find "Compelled Consent" Forms Lawful, It Should Require That Such Forms Disclose Whether They Were Executed Pursuant To Court Order.

As stated previously, *amicus* takes no position on the Fifth Amendment issue raised by petitioner, but, if the Court decides that a compelled consent does not violate the Fifth Amendment, *amicus* requests that the Court explicitly require any such compelled consent to indicate that it has been executed pursuant to court order. Inclusion of such language is essential to the ability of Cayman courts to administer Cayman law. In addition, United States courts have required the inclusion of such language in a consent directive to avoid offending "basic precepts of honest behavior." *In re N.D.N.Y. Grand Jury Subpoena #86-0351-8*, 811 F.2d 114, 117-118 (2d Cir.

¹⁸ In *United States v. Quigg*, Crim. No. 80-40-1, slip op. (D. Vt. 1981) (withdrawn Mar. 25, 1982), the court mentioned in passing its concerns "under principles of comity and international law" but failed to apply any comity analysis to its requirement that Quigg be ordered to consent to the disclosure of his Bahamian bank records.

1987); see also *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791, 795 (1st Cir. 1987) (court is "further troubled by the fact that the consent directive does not indicate that it is being executed under the compulsion of a court order"). Because inclusion of the language indicating the source of the consent is in no way inconsistent with United States law but is vital to enforcement of Cayman law, *amicus* respectfully requests the Court to hold that all compelled consents must state expressly the circumstances under which they were executed.

CONCLUSION

For the foregoing reasons, in deciding this case the Court should refrain from addressing any issues involving international comity and conflict between the laws of sovereign nations, and should reserve them for judgment in a more appropriate case and on a more complete record.

Respectfully submitted,

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